

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

4 JACK R. YARBROUGH,

5 Plaintiff,

6 v.

7
8 ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company, and MANAGEMENT)
9 GROUP OREGON, INC., an Oregon Corporation,)
And CHARLES SIDES, an Individual,)

10 Defendants.)
11

Case No. 11C9158

COMPLAINT

JUDICIAL FORECLOSURE OF
TRUST DEED; MONEY DAMAGES;
SPECIFIC PERFORMANCE; SUIT
UPON PERSONAL GUARANTEE
AND MISREPRESENTATION

Claims between \$150,000.00-
\$499,000.00
(NOT Subject to Mandatory Arbitration)

12 Plaintiff alleges as follows:

13 FACTS COMMON TO ALL CAUSES OF ACTION

14 1.

15 Jack R. Yarbrough (hereinafter "Yarbrough") was at all material times herein a resident
16 of the City of Keizer, State of Oregon.

17 2.

18 Defendant Aspen Pacific City, LLC (hereinafter "Aspen"), is a Limited Liability
19 Company, organized and existing under the laws of the State of Oregon with a principal place of
20 business in Marion County, Oregon.
21
22

1 3.

2 Defendant Management Group Oregon, Inc. (hereinafter "Management Group"), is an
3 Oregon corporation, organized and existing under the laws of the State of Oregon with a
4 principal place of business in Marion County, Oregon.

5 4.

6 Defendant Charles Sides, (hereinafter "Sides") was at all times herein mentioned, and
7 now is a resident of Marion County, Oregon. All acts and conduct attributable to Sides in this
8 Complaint were undertaken within the course and scope of his association and employment with
9 the Corporations mentioned herein, were sanctioned, ratified, or adopted by the Corporations as
10 part of Sides' actual, apparent, or implied authority.

11 5.

12 On or about April 28, 2010, (hereinafter the "April 2010 Loan") Defendants Aspen and
13 Sides, for value received, made and executed their promissory note in the amount of \$350,000.00
14 payable to Plaintiff Yarbrough according to the terms and provisions of the promissory note. On
15 about April 28, 2010, said Defendants entered into a Loan Agreement with Yarbrough for the
16 sum of \$350,000.00. Said financial obligations are secured by a Deed of Trust upon certain real
17 property executed as part of the loan transaction. (All three documents are collectively referred
18 to herein as "The April Loan Documents" and are attached as Exhibits "A," "B," and "C").

19 6.

20 On or about April 28, 2010, Defendant Sides Personally Guaranteed to Yarbrough all
21 obligations of Aspen under the April loan documents including the promissory note set forth
22 hereinabove.

1 7.

2 On or about January 25, 2011, (hereinafter the "January Loan") Defendants
3 Management Group and Sides, for value received, made and executed a loan agreement and note
4 in the amount of \$185,000.00 payable to Plaintiff Yarbrough according to the terms and
5 provisions of the documents. In lieu of a Loan Fee, said Defendants agreed to convey and
6 deliver to Yarbrough a steel commercial building valued at not less than \$25,000.00. Said
7 financial obligations are secured by a UCC Financing Statement upon certain income executed
8 as part of the loan transaction. (all documents are collectively referred to herein as "The January
9 Loan Documents" and are attached as Exhibits "D," "E," and "F").

10 8.

11 On or about January 25, 2011, Defendant Sides Personally Guaranteed to Yarbrough all
12 obligations of Management Group under the January loan documents set forth hereinabove.

13 9.

14 At the time that Defendant Sides pledged as security the "Account" evidenced in
15 Exhibit "F" for the loan set forth in paragraph 7 hereinabove, the representation that such
16 "Account" represented actual security and collateral for the loan was false in that Defendant
17 Sides had no sufficient or reasonable ground for believing said representation to be true.
18 Defendant concealed from Plaintiff his lack of information and data that prevented him from
19 making a true evaluation of the facts.

20 ///

21 ///

22 ///

10.

Plaintiffs have performed all conditions, covenants and promises under the April loan agreements. All amounts under the April note and loan documents became immediately due and payable on April 26, 2011.

11.

Delinquent installments and other amounts under the January note and loan documents are due immediately. Defendants have failed and refused to deliver the steel building pledged to Yarbrough in lieu of loan fees.

12.

The notes and other loan documents set forth hereinabove, including the deed of trust, provide that Plaintiff is entitled to recover reasonable attorney fees and all reasonable costs and expenses incurred in enforcing the notes and foreclosing the security. There are no other proceedings for the collection of these debt or a foreclosure of the deed of trust.

FIRST CAUSE OF ACTION

(Foreclosure of Real Property pursuant to the April Loan)

For his First Cause of Action, Plaintiff alleges:

13.

Plaintiff re-alleges paragraphs 1 through 12.

14.

The interests of Defendants are inferior to the interests of the trust deed referenced in paragraph 5. Plaintiff is entitled to a judgment of foreclosure that Plaintiff's lien is valid lien on the property and foreclosing all interest of the Defendants in the subject real property.

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For Count One of the Second Cause of Action, Plaintiff alleges:

15.

Plaintiff re-alleges paragraphs 1 through 12.

16.

Defendants are in default of the terms of the January Loan, namely in failing to timely make monthly installment payments. Plaintiff is entitled to judgment against Defendants for the principal sum of \$9,000.00 to date, representing the monetary value of missed installments, plus accrued interest and assessments until paid, plus reasonable attorney fees, all of which amounts are continuing to accrue and shall be amended at the time of trial.

(Count Two Pursuant to the January Loan-Specific Performance)

For Count Two of the Second Cause of Action, Plaintiff alleges:

17.

Plaintiff re-alleges paragraphs 1 through 12.

18.

Although demand has been made on the Defendants to fully consummate the transaction by the delivery of the commercial steel building, as provided in the agreements, Defendants have failed and refused, and still fail and refuse to perform as required.

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THIRD CAUSE OF ACTION
(Personal Guarantees on April and January Loans)

For his Third Cause of Action, Plaintiff alleges:

19.

Plaintiff re-alleges paragraphs 1 through 12.

20.

Defendant Sides personally guaranteed all obligations of the corporate Defendants under the terms of the loan documents and promissory notes, and therefore is personally liable for all obligations financial and otherwise pursuant to the loan documents, in an amount to be proven at the time of trial, but in no event less than \$384,000.00.

FOURTH CAUSE OF ACTION (Fraud and Misrepresentation)

21.

Plaintiffs incorporate paragraphs 1 through 13 as if restated verbatim.

22.

The intentional acts and omissions of the Defendant as alleged in Paragraph 9 hereinabove constitute misrepresentation and fraud constituting breach of Defendants obligations to the Plaintiff. Had Plaintiff been fully apprised of the true facts he would not have made the loan set forth in paragraph 7 hereinablve.

23.

As a direct and proximate result of the acts or omissions alleged hereinabove stated, plaintiff has suffered economic damage in the following amounts:

1 a. Economic damages to be proven at the time of trial, but no event less than
2 \$185,000.00.

3 WHEREFORE, Plaintiff prays for an order of this court, awarding:

4 A. UPON THE CAUSE OF ACTION ON THE APRIL LOAN:

- 5 1. That Plaintiff have a judgment against Defendants for the principal sum of
6 \$350,000.00, plus accrued interest and assessments until paid, plus reasonable
7 attorney fees, the further sum of \$200.00 for foreclosure title report to search records,
8 and for Plaintiff's costs and disbursements incurred herein;
- 9 2. That Plaintiff's real property trust deed set forth in the first cause of suit be declared a
10 valid and existing lien upon the subject real property for the amount of the judgment
11 prayed for in said cause of suit;
- 12 3. Declaring the interest of the Defendants to be inferior to the lien of Plaintiff;
- 13 4. That Plaintiff's trust deed upon the subject real property be foreclosed; that the title,
14 claim, interest or demand of Defendants in said property, and every part thereof,
15 saving and excepting the right of redemption, if any, be foreclosed;
- 16 5. That the above described real property with all its appurtenances, rights, privileges
17 and easements shall be sold by the Sheriff on execution after giving notice required
18 by law; that any party to this suit may be a purchaser at said sale; and that said
19 purchaser be let into the immediate possession of said real property and every part
20 thereof; that said Sheriff give to any such purchaser of the real property a Certificate
21 of Sale and after the time allowed for redemption of said real property, unless said
22 real property be redeemed, a deed;
- 14 6. That the proceeds of said sale be applied as follows:
- 15 a. First, to pay costs and expenses of sale;
 - 16 b. Second, to pay the judgment of plaintiff on its cause of suit;
 - 17 c. Third, any overplus to be paid to the Clerk of this Court, subject to the further
18 order of this Court;
- 19 7. For such other and further relief as this Court deems just and proper.

18 B. UPON COUNT ONE OF THE CAUSE OF ACTION ON THE JANUARY LOAN:

- 19 1. That Plaintiff have a judgment against Defendants for the principal sum of
20 \$9,000.00 to date, plus accrued interest and assessments until paid;
- 21 2. For costs and disbursements;
- 22 3. For attorney fees in an amount to be determined pursuant to ORS 68;
4. For such other and further relief as the court may deem proper.

1 C. UPON COUNT TWO OF THE CAUSE OF ACTION ON THE JANUARY LOAN

- 2 1. For a decree of specific performance and order of delivery of the Steel Building
3 hereinabove described;
4 2. For costs and disbursements;
5 3. For attorney fees in an amount to be determined pursuant to ORS 68;
6 4. For such other and further relief as the court may deem proper.

7 D. UPON THE CAUSE OF ACTION ON THE PERSONAL GUARANTEES:

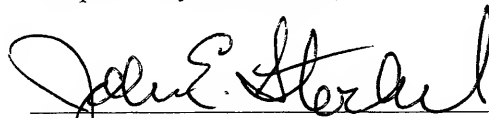
- 8 1. For the sum of \$384,000.00, with interest and assessments thereon from the
9 respective maturity and default dates;
10 2. For costs and disbursements;
11 3. For attorney fees in an amount to be determined pursuant to ORS 68;
12 4. For such other and further relief as the court may deem proper.

13 E) UPON THE FOURTH CLAIM FOR FRAUD

- 14 1. For monies owed pursuant to contract;
15 2. For Plaintiff's cost and disbursements incurred herein; and
16 3. For such other and further relief as this Court deems just and proper.

17 DATED this 24th day of July, 2011.

18 Respectfully Submitted,

19 
20 John E. Storkel, OSB No. 850871
21 Attorney for Plaintiff
22

PROMISSORY NOTE

\$350,000

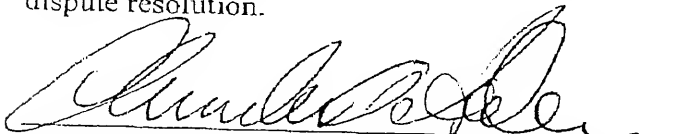
April 27, 2010

We, Apsen Pacific City, LLC and Charles Sides promise to pay to the order of Jack R. Yarbrough, THREE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS with interest thereon at the rate of fifteen percent (15%) per annum.

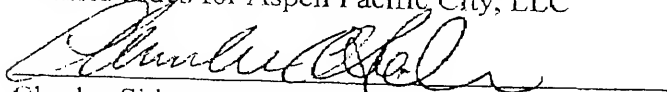
If Borrower fails to pay to Lender \$4375.00 per month on or before the 5th day of the month during which it is due, Lender shall assess against Borrower a late payment fee in the amount of \$100.00 per day until the full amount, to include any and all additional costs and late fees are paid in full. All payments/monies received shall first be applied to any outstanding additional costs, including late fees, then interest and finally the principle balance.

If Borrower fails to pay to Lender \$350,000.00, plus any and all interest, costs and late fees on or before April 26, 2011, Lender shall assess against Borrower a late payment fee in the amount of \$300.00 per day until the full payment to include principal, interest and any additional costs are paid in full. All payments/monies received shall first be applied to outstanding costs, including late fees, then interest and then the principle amount.

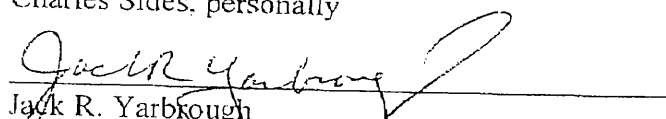
In the event a dispute arises with respect to this agreement, the prevailing party shall be entitled to recover their reasonable legal costs/attorney fees and costs incurred in the enforcement of said agreement regardless of whether or not the matter is ultimately resolved by trial or other means of dispute resolution.


Charles Sides for Aspen Pacific City, LLC

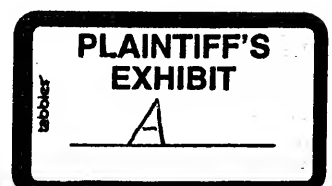
Date 7/28/10


Charles Sides, personally

Date 7/28/10


Jack R. Yarbrough

Date 7-28⁹¹¹-10



LOAN AGREEMENT

AGREEMENT made this 27th day of April 2010 by and between Jack R. Yarbrough, hereinafter "Lender," and Aspen Pacific City, LLC and Charles Sides, hereinafter "Borrower."

1. **LOAN AMOUNT:** The loan amount, which Lender agrees to lend to Borrower, shall be in the sum of THREE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$350,000.00)

2. **INTEREST RATE AND DUE DATE:** Borrower shall pay the balance of the loan, including interest at fifteen percent (15%) per annum on or before April 26, 2011.

3. **PAYMENT SCHEDULE AND LATE FEES:** Borrower shall make monthly installments of \$4375.00, which represents interest only, the first of such installments shall be paid on or before June 1, 2010 and subsequent installments to be paid on the same day of each and every month thereafter.

If Borrower fails to pay to Lender \$4375.00 per month on or before the 5th day of the month during which it is due, Lender shall assess against Borrower a late payment fee in the amount of \$100.00 per day until the full amount, to include any and all additional costs and late fees are paid in full. All payments/monies received shall first be applied to any outstanding additional costs, including late fees, then interest and finally the principle balance.

If Borrower fails to pay to Lender \$350,000.00, plus any and all interest, costs and late fees on or before April 26, 2011, Lender shall assess against Borrower a late payment fee in the amount of \$300.00 per day until the full payment to include principal, interest and any additional costs are paid in full. All payments/monies received shall first be applied to outstanding costs, including late fees, then interest and then the principle amount.

Borrower expressly acknowledges that Borrower shall be required to pay late fees if Borrower fails to make any payments when due pursuant to this agreement. The late fees apply not only to balloon payments but also to the final payment due pursuant to this agreement. Borrower expressly acknowledges and agrees that these late fees are not penalties but are, instead, considerations to the Lender to induce him to make the loan and further that said late fees are consideration for the loss of use by the Lender of the money which has been lent pursuant to this agreement. Borrower specifically waives any right to inquire with respect to Lender's prospective uses for monies not paid under this agreement which give rise to the entitlement of the Lender to late fees.

4. **FEES:** Borrower agrees to supply all lumber and material to build a 48' x 60' shop, similar to the shop located at 8306 Wheatland Rd N, Keizer, OR. (2x4's - 2x6's - 2x8's) 7/11/10

Borrower also agrees to pay the cost of moving a quanset hut from its' current location of 2159

Clearlake Rd N to the northeast corner of same property with not any liability on the move.

Borrower also agrees to pay the cost to move and set on foundation three homes from the general area of St Croix/Ridge Dr to the Evergreen property that can legally be placed on the lots. Borrower acknowledges that he has three homes that will legally fit on the stated lots at Evergreen that are in good condition. See Exh. 1 IRY 6/5

5. **TERM:** The term of this loan shall be for a period not to exceed one (1) year, April 26, 2011.

6. **LOAN DISBURSEMENT:** Lender shall give to Borrower a check in the amount of \$350,000.00, after all fees/costs, to include loan fees, recording fees, escrow fees and encumbrances are paid and after this agreement and the accompanying promissory note and additional documents have been fully executed.

7. **RENTS:** Lender shall receive all rent checks for the current rent amounts from the renters at the collateralized property - 1100 West Valley View Rd, Talent, OR until this loan is paid in full. if the monthly interest is not paid. IRY

8. **IMPROVEMENTS, ALTERATIONS AND REPAIRS:** Borrower shall not commit or suffer any waste of the property, or any improvements thereon, or alterations thereof, and shall maintain the property, and all improvements thereon, and alterations thereof, in good condition and repair. Borrower shall not otherwise make or cause to be made any improvements or alterations to the property without first obtaining the written consent of the Lender, which consent shall not be unreasonably withheld.

9. **INSURANCE/TAXES:** Borrower shall maintain and provide proof of insurance showing the Lender as Additional Insured. Borrower shall also keep all property taxes current

10. **SECURITY:** As security for this loan, Borrower grants a first trust deed on property located at 1100 West Valley View Rd, Talent, OR. (See Exhibit A for legal description).

Borrower further agrees to execute a signed Warranty Deed listing Jack R. Yarbrough as the owner of the property and shall also provide irrevocable instructions authorizing Lender to record said Warranty Deed if Borrower is in default, both of which shall be held by Lender.

Borrower further agrees to execute in its personal and corporate capacity, a promissory note in the sum of \$350,000.00.

11. **LIENS:** Borrower agrees to maintain said property free and clear from any and all liens and encumbrances. However, should said property be encumbered either prior to, or subsequent to the date of the execution of this agreement, Borrower agrees to save and hold harmless Lender from any liability which may result from said encumbrances.

12. **RULE OF CONSTRUCTION:** Any rule of construction interpreting a document against its drafter shall be inapplicable.

13. **DEFAULT:** In the event that Borrower defaults with respect to the repayment of this loan, or any interest installments thereunder, Lender shall have all remedies available to him pursuant to Oregon law and pursuant to the terms of this Loan Agreement.

14. **WAIVER:** Failure by Lender at any time to require performance by Borrower of any of the provisions hereof shall in no way affect Lender's rights hereunder to enforce the same, nor shall any waiver by Lender of any breach hereof be held to be a waiver of any succeeding breach, or a waiver of this nonwaiver clause.

15. **PLACE OF VENUE:** Both Borrower and Lender agree that any legal action, to include foreclosure or forfeiture will be filed and take place in the State of Oregon, Marion County Court System.

16. **ATTORNEY FEES:** In the event a dispute arises with respect to this agreement, the prevailing party shall be entitled to recover their reasonable attorney fees and costs incurred in the enforcement of said agreement regardless of whether or not the matter is ultimately resolved by trial or other means of dispute resolution.

Borrower agrees to appear in and defend any action or proceeding purporting to affect the security rights or powers of Lender and in any suit, action or proceeding in which the seller may appear, including any suit for the foreclosure or forfeiture of this agreement or any suit or action related to this instrument, including but not limited to its validity and/or enforceability, to pay all costs and expenses, including evidence of title and the Lender's attorney fees; the amount of attorney fees mentioned in Paragraph 16 in all cases shall be fixed by the trial court or the Lender, in case of forfeiture, and in the event of an appeal from any judgment or decree of the trial court, Borrower further agrees to pay such sum at the Appellate court shall adjudge reasonable as the Lender's fees on such appeal.

17. **NOTICES:** Any notices or demands to be given one party to the other as required by this Agreement or otherwise shall be sent registered or certified, return receipt requested, unless the other party has been notified of a change of address and has been received by said party prior the time of mailing of any other notice. Any such notice shall be deemed to have been delivered and given, forty-eight (48) hours after the postmark thereof. Notices shall be sent as follows:

(a) Upon the Lender - P.O. Box 20756, Keizer, OR 97307

(b) Upon the Borrower – P.O. Box 2087, Salem, OR 97308

18. **MISCELLANEOUS:** Lender shall be reimbursed for any/all costs and labor, (at his standard hourly rate of \$65.00 per hour), that he or his office staff have incurred in the collection/enforcement of this sales agreement, to include legal action/ foreclosure, repossession or forfeiture of said property.

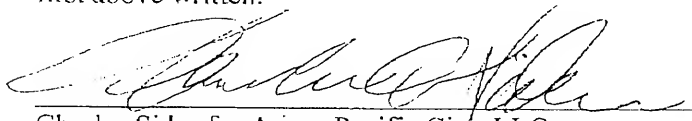
198. **INTEGRATION:** This Agreement embodies the entire agreement of the parties hereto.

Borrower agrees that Borrower has not relied upon any statements made by Lender that are not set out in writing in this Agreement. If any portion of this Agreement is deemed to be invalid, the remainder hereof shall be given full force and effect.


20. **TIME IS OF THE ESSENCE:** Time is of the essence of this Agreement and every provision herein.

21. **ENTIRE AGREEMENT:** This contract replaces the previous loan agreement dated April 27, 2010 and signed April 27, 2010.

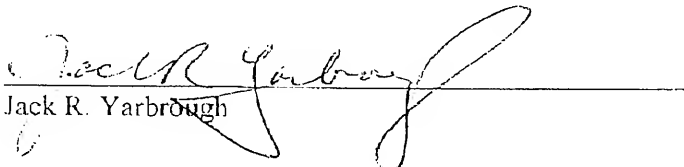
IN WITNESS WHEREOF, the parties have executed this agreement in duplicate the day and year first above written.


Charles Sides for Aspen Pacific City, LLC

4/28/10
Date


Charles Sides

4/28/10
Date


Jack R. Yarbrough

4-28-10
Date

EXHIBIT 1

Borrower has option to purchase three (3) Evergreen lots for \$35,000.00 each. Borrower to notify lender of his choice of option within 60 days. Borrower has permission to set homes on said property and has 6 months from date of signing to purchase property.

TRUST DEED

Aspen Pacific City, LLC

P.O. Box 2087

Salem, Or 97308

Grantor's Name and Address

Jack Yarbrough

P.O. Box 20756

Keizer, OR 97307

Beneficiary's Name and Address

After recording, return to (Name, Address, Zip):

Jack Yarbrough

P.O. Box 20756

Keizer, OR 97307

SPACE RESERVED
FOR
RECORDER'S USE

Jackson County Official Records 2010-014456

R-TD

Cnt=1 ALONZOM 05/07/2010 01:17:09 PM

S15 03 \$10 00 \$5 00 \$11 00 \$45 00 Total:\$66.00

S1

Cc



FSC

01425115201000144560030030

at

Christine Walker, County Clerk for Jackson County, Oregon, certifi-

bo

that the instrument identified herein was recorded in the Clerk

ani

Christine Walker - County Clerk

No.

Witness my hand and seal of County affixed.

NAME

TITLE

By _____, Deputy.

THIS TRUST DEED, made on 27th Day of April 2010

Aspen Pacific City, LLC

John Storkel, Atty

Jack Yarbrough

between

as Grantor,

as Trustee, and

as Beneficiary,

WITNESSETH:

Grantor irrevocably grants, bargains, sells and conveys to trustee, in trust, with power of sale, the property in Jackson County, Oregon, described as:

1100 West Valley View Rd, Talent, Or

See Exhibit A for Legal Description

together with all and singular the tenements, hereditaments and appurtenances and all other rights thereunto belonging or in any way now or hereafter appertaining, and the rents, issues and profits thereof, and all fixtures now or hereafter attached to or used in connection with the property.

FOR THE PURPOSE OF SECURING PERFORMANCE of each agreement of grantor herein contained and payment of the sum of THREE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$350,000.00)

Dollars, with interest thereon according to the terms of a promissory note of even date herewith, payable to beneficiary or order and made by grantor, the final payment of principal and interest, if not sooner paid, to be due and payable on April 26, 2011.

The date of maturity of the debt secured by this instrument is the date, stated above, on which the final installment of the note becomes due and payable. Should the grantor either agree to, attempt to, or actually sell, convey, or assign all (or any part) of the property, or all (or any part) of grantor's interest in it without first obtaining the written consent or approval of the beneficiary, then, at the beneficiary's option, all obligations secured by this instrument, irrespective of the maturity dates expressed therein, or herein, shall become immediately due and payable. The execution by grantor of an earnest money agreement** does not constitute a sale, conveyance or assignment.

To protect the security of this trust deed, grantor agrees:

1. To protect, preserve and maintain the property in good condition and repair; not to remove or demolish any building or improvement thereon; and not to commit or permit any waste of the property.

2. To complete or restore promptly and in good and habitable condition any building or improvement which may be constructed, damaged or destroyed thereon, and pay when due all costs incurred therefor.

3. To comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property; if the beneficiary so requests, to join in executing such financing statements pursuant to the Uniform Commercial Code as the beneficiary may require, and to pay for filing the same in the proper public office or offices, as well as the cost of all lien searches made by filing officers or searching agencies as may be deemed desirable by the beneficiary.

4. To provide and continuously maintain insurance on the buildings now or hereafter erected on the property against loss or damage by fire and other hazards, as the beneficiary may from time to time require, in an amount not less than full ins value, which by one or more companies acceptable to the beneficiary, with loss payable to the latter. All policies of insurance shall be delivered to the beneficiary as soon as issued. If the grantor shall fail for any reason to procure any such insurance and to deliver the policies to the beneficiary at least fifteen days prior to the expiration of any policy of insurance now or hereafter placed on the buildings, the beneficiary may procure the same at grantor's expense. The amount collected under any fire or other insurance policy may be applied by beneficiary upon any indebtedness secured hereby and in such order as beneficiary may determine, or at option of beneficiary the entire amount so collected, or any part thereof, may be released to grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

5. To keep the property free from construction liens and to pay all taxes, assessments and other charges that may be levied or assessed upon or against the property, before any part of such taxes, assessments and other charges becomes past due or delinquent and promptly deliver receipts therefor to beneficiary. Should the grantor fail to make payment of any taxes, assessments, insurance premiums, liens or other charges payable by grantor, either by direct payment or by providing beneficiary with funds with which to make such payment, beneficiary may, at its option, make payment thereof, and the amount so paid, with interest at the rate set forth in the note secured hereby, together with the obligations described in paragraphs 6 and 7 of this trust deed, shall be added to and become a part of the debt secured by this trust deed, without waiver of any rights arising from breach of any of the covenants hereof. For such payments, with interest as aforesaid, the property hereinafter described, as well as the grantor, shall be bound to the same extent that they are bound for the payment of the obligation herein described. All such payments shall be immediately due and payable without notice, and the nonpayment thereof shall, at the option of the beneficiary, render all sums secured by this trust deed immediately due and payable and shall constitute a breach of this trust deed.

6. To pay all costs, fees and expenses of this trust, including the cost of title search, as well as the other costs and expenses of the trustee incurred in connection with or in enforcing this obligation, and trustee and attorney fees actually incurred.

7. To appear in and defend any action or proceeding purporting to affect the security rights or powers of beneficiary or trustee; and in any suit, action or proceeding in which the beneficiary or trustee may appear, including any suit for the foreclosure of this deed or any suit or action related to this instrument, including but not limited to its validity and/or enforceability, to pay all costs and expenses, including evidence of title and the beneficiary's or trustee's attorney fees. The amount of attorney fees mentioned in this paragraph in all cases shall be fixed by the trial court, and in the event of an appeal from any judgment or decree of the trial court, grantor further agrees to pay such sum as the appellate court shall adjudge reasonable as the beneficiary's or trustee's attorney fees on such appeal.

It is mutually agreed that:

8. In the event that any portion or all of the property shall be taken under the right of eminent domain or condemnation, beneficiary shall have the right, if it so elects, to require that all or any portion of the monies payable as compensation for such taking which are in excess of the amount required to pay all reasonable costs, expenses and attorney fees necessarily paid or incurred by grantor in such proceedings, shall be paid to beneficiary and applied by it first upon any reasonable costs and expenses and attorney fees, both in the trial and appellate courts, necessarily paid or incurred by beneficiary in such proceedings, and the balance applied upon the indebtedness secured hereby. Grantor agrees, at its own expense, to take such actions and execute such instruments as shall be necessary in obtaining such compensation promptly upon beneficiary's request.

NOTE: The Trust Deed Act provides that the trustee hereunder must be either an attorney who is an active member of the Oregon State Bar, a bank, trust company or savings and loan association authorized to do business under the laws of Oregon or the United States, a title insurance company authorized to insure title to real property of this state, its subsidiaries, affiliates, agents or branches, the United States or any agency thereof, or an escrow agent licensed under ORS 895.505 to 895.545.

WARNING: 12 USC 4701-3 regulates and may prohibit exercise of this option.

**The publisher suggests that such an agreement address the issue of obtaining beneficiary's consent in complete detail.

PLAINTIFF'S
EXHIBIT

C

9. At any time, and from time to time upon written request of beneficiary, payment of its fees and presentation of this deed and the note for endorsement (in case of full reconveyance, for cancellation), without affecting the liability of any person for the payment of the indebtedness, trustee may (a) consent to the making of any map or plat of the property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this deed or the lien or charge thereon; or (d) reconvey, without warranty, all or any part of the property. The grantee in any reconveyance may be described as the "person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustee fees for any of the services mentioned in this paragraph shall be not less than \$5.

10. Upon any default by grantor hereunder, beneficiary may, at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of the property or any part thereof, in its own name sue or otherwise collect the rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, upon any indebtedness secured hereby, and in such order as beneficiary may determine.

11. The entering upon and taking possession of the property, the collection of such rents, issues and profits, or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of the property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder, or invalidate any act done pursuant to such notice.

12. Upon default by grantor in payment of any indebtedness secured hereby or in grantor's performance of any agreement hereunder, time being of the essence with respect to such payment and/or performance, the beneficiary may declare all sums secured hereby immediately due and payable. In such event, the beneficiary may elect to proceed to foreclose this trust deed in equity as a mortgage or direct the trustee to foreclose this trust deed by advertisement and sale, or may direct the trustee to pursue any other right or remedy, either at law or in equity, which the beneficiary may have. In the event the beneficiary elects to foreclose by advertisement and sale, the beneficiary or the trustee shall execute and cause to be recorded a written notice of default and election to sell the property to satisfy the obligation secured hereby whereupon the trustee shall fix the time and place of sale, give notice thereof as then required by law and proceed to foreclose this trust deed in the manner provided in ORS 86.735 to 86.745.

13. After the trustee has commenced foreclosure by advertisement and sale, and at any time prior to 5 days before the date the trustee conducts the sale, the grantor or any other person so privileged by ORS 86.753 may cure the default or defaults. If the default consists of a failure to pay, when due, sums secured by the trust deed, the default may be cured by paying the entire amount due at the time of the cure other than such portion as would not then be due had no default occurred. Any other default that is capable of being cured may be cured by tendering the performance required under the obligation or trust deed. In any case, in addition to curing the default or defaults, the person effecting the cure shall pay to the beneficiary all costs and expenses actually incurred in enforcing the obligation of the trust deed, together with trustee and attorney fees not exceeding the amounts provided by law.

14. Otherwise, the sale shall be held on the date and at the time and place designated in the notice of sale or the time to which the sale may be postponed as provided by law. The trustee may sell the property either in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash, payable at the time of sale. Trustee shall deliver to the purchaser its deed in form as required by law conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters of fact shall be conclusive proof of the truthfulness thereof. Any person, excluding the trustee, but including the grantor and beneficiary, may purchase at the sale.

15. When trustee sells pursuant to the powers provided herein, trustee shall apply the proceeds of sale to payment of: (1) the expenses of sale, including the compensation of the trustee and a reasonable charge by trustee's attorney; (2) to the obligation secured by the trust deed; (3) to all persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear in the order of their priority; and (4) the surplus, if any, to the grantor, or to any successor in interest entitled to such surplus.

16. Beneficiary may, from time to time, appoint a successor or successors to any trustee named herein or to any successor trustee appointed hereunder. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all title, powers and duties conferred upon any trustee herein named or appointed hereunder. Each such appointment and substitution shall be made by written instrument executed by beneficiary, which, when recorded in the mortgage records of the county or counties in which the property is situated, shall be conclusive proof of proper appointment of the successor trustee.

17. Trustee accepts this trust when this deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereof of pending sale under any other deed of trust or of any action or proceeding in which grantor, beneficiary or trustee shall be a party unless such action or proceeding is brought by trustee.

The grantor covenants to and agrees with the beneficiary and the beneficiary's successors in interest that the grantor is lawfully seized in fee simple of the real property and has a valid, unencumbered title therein, except as may be set forth in any addendum or exhibit attached hereto, and that the grantor will warrant and defend the same against all persons whomsoever.

WARNING: Unless grantor provides beneficiary with evidence of insurance coverage as required by the contract or loan agreement between them, beneficiary may purchase insurance at grantor's expense to protect beneficiary's interest. This insurance may, but need not, also protect grantor's interest. If the collateral becomes damaged, the coverage purchased by beneficiary may not pay any claim made by or against grantor. Grantor may later cancel the coverage by providing evidence that grantor has obtained property coverage elsewhere. Grantor is responsible for the cost of any insurance coverage purchased by beneficiary, which cost may be added to grantor's contract or loan balance. If it is so added, the interest rate on the underlying contract or loan will apply to it. The effective date of coverage may be the date grantor's prior coverage lapsed or the date grantor failed to provide proof of coverage. The coverage beneficiary purchases may be considerably more expensive than insurance grantor might otherwise obtain alone and may not satisfy any need for property damage coverage or any mandatory liability insurance requirements imposed by applicable law.

The grantor warrants that the proceeds of the loan represented by the above described note and this trust deed are (choose one):

(a) primarily for grantor's personal, family or household purposes (see Important Notice below);

(b) for an organization, or (even if grantor is a natural person) are for business or commercial purposes.

This deed applies to, inures to the benefit of, and binds all parties herein, their heirs, legatees, devisees, administrators, executors, personal representatives, successors and assigns. The term beneficiary shall mean the holder and owner, including pledgee, of the contract secured hereby, whether or not named as a beneficiary herein.

In construing this trust deed, it is understood that the grantor, trustee and/or beneficiary may each be more than one person; that if the context so requires, the singular shall be taken to mean and include the plural, and that generally all grammatical changes shall be made, assumed and implied to make the provisions hereof apply equally to corporations and to individuals.

IN WITNESS WHEREOF, the grantor has executed this instrument the day and year first written above.

***IMPORTANT NOTICE:** Delete, by lining out, whichever warranty (a) or (b) is inapplicable. If warranty (a) is applicable and the beneficiary is a creditor as such word is defined in the Truth-in-Lending Act and Regulation Z, the beneficiary MUST comply with the Act and Regulation by making required disclosures. For this purpose use Stevens-Ness Form No. 1319, or the equivalent. If compliance with the Act is not required, disregard this notice.

Charles Sides

STATE OF OREGON, County of Marion

This instrument was acknowledged before me on May 3, 2010

by

This instrument was acknowledged before me on

by Charles Sides

as Managing Member

of Aspen Pacific City, LLC



NOTARY SEAL
J. J. ALLMAN
NOTARY PUBLIC - OREGON
COMMISSION NO. 423656
EXPIRES JUN 11, 2012

Notary Public for Oregon

My commission expires 6-11-2012

REQUEST FOR FULL RECONVEYANCE (To be used only when obligations have been paid.)

TO: _____, Trustee

The undersigned is the legal owner and holder of all indebtedness secured by the foregoing trust deed. All sums secured by the trust deed have been fully paid and satisfied. You hereby are directed, on payment to you of any sums owing by you under the terms of the trust deed or pursuant to statute, to cancel all evidences of indebtedness secured by the trust deed (which are delivered to you herewith) together with the trust deed and to reconvey, without warranty, to the parties designated by the terms of the trust deed, the estate now held by you under the same. Mail the reconveyance and documents to _____

DATED _____

Do not lose or destroy this Trust Deed OR THE NOTE which it secures. Both should be delivered to the trustee for cancellation before reconveyance is made.

Beneficiary

Exhibit "A"

Real property in the County of Jackson, State of Oregon, described as follows:

THAT PORTION OF THE FOLLOWING DESCRIBED TRACT LYING NORTH OF THAT TRACT CONVEYED TO THE STATE OF OREGON, BY AND THROUGH ITS STATE HIGHWAY COMMISSION, BY DEED RECORDED IN VOLUME 501, PAGE 394, JACKSON COUNTY, OREGON, DEED RECORDS, TO WIT: BEGINNING AT A POINT IN THE CENTER OF THE COUNTY ROAD, 792.8 FEET WEST, AND 2654.9 FEET SOUTH OF THE NORTHWEST CORNER OF DONATION LAND CLAIM NO. 42, TOWNSHIP 38 SOUTH, RANGE 1 EAST, WILLAMETTE MERIDIAN, JACKSON COUNTY, OREGON; THENCE NORTH 85° 24' WEST, 72.90 FEET, ALONG THE CENTERLINE OF THE COUNTY ROAD; THENCE NORTH 64°16' WEST, 1647.4 FEET, ALONG THE CENTERLINE OF THE COUNTY ROAD, TO THE NORTHEAST CORNER OF TRACT DESCRIBED IN VOLUME 261, PAGE 22, JACKSON COUNTY, OREGON, DEED RECORDS THENCE SOUTH, 2646.2 FEET; THENCE SOUTH 36°00' EAST, 552.2 FEET; THENCE SOUTH 49°36' EAST, 264.9 FEET, TO THE SOUTH LINE OF DONATION LAND CLAIM NO. 73, TOWNSHIP 38 SOUTH, RANGE 1 WEST, WILLAMETTE MERIDIAN, JACKSON COUNTY, OREGON; THENCE SOUTH 89°34' EAST, 1029.6 FEET, ALONG THE SOUTH LINE OF SAID CLAIM NO. 73, AND CLAIM NO. 74, SAID TOWNSHIP AND RANGE; THENCE NORTH 0°01' EAST, 2551.2 FEET, TO THE POINT OF BEGINNING.

NOTE: This legal description was created prior to January 1, 2008.

Tax Parcel Number: 1-012382-0

PROMISSORY NOTE

\$185,000.00

January 25, 2011

I, Charles A. Sides personally and for Management Group Oregon, Inc., promise to pay to the order of Jack R. Yarbrough, ONE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS with interest thereon at the rate of fifteen percent (15%) per annum.

If Borrower fails to pay to Lender \$9,000.00 per month on or before the 5th day of the month during which it is due, Lender shall assess against Borrower a late payment fee in the amount of \$50.00 per day until the full amount, to include any and all additional costs and late fees are paid in full. All payments/monies received shall first be applied to any outstanding additional costs, including late fees, then interest and finally the principle balance.

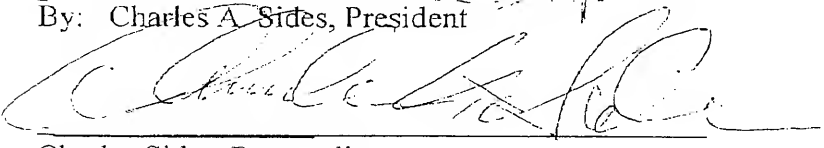
If Borrower fails to pay to Lender \$106,663.05, plus any and all interest, costs and late fees on or before January 24, 2012, Lender shall assess against Borrower a late payment fee in the amount of \$200.00 per day until the full payment to include principal, interest and any additional costs are paid in full. All payments/monies received shall first be applied to outstanding costs, including late fees, then interest and then the principle amount.

In the event a dispute arises with respect to this agreement, the prevailing party shall be entitled to recover their reasonable legal costs/attorney fees and costs incurred in the enforcement of said agreement regardless of whether or not the matter is ultimately resolved by trial or other means of dispute resolution.

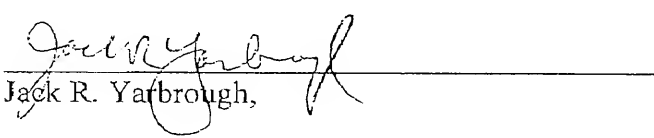
MANAGEMENT GROUP OREGON, INC.


By: Charles A. Sides, President

Date 1-24-11


Charles Sides, Personally

Date 1-24-11


Jack R. Yarbrough,

Date 1-24-11

PLAINTIFF'S
EXHIBIT

D

LOAN AGREEMENT

AGREEMENT made this 25th day of January 2011 by and between Jack R. Yarbrough, hereinafter "Lender," and Chuck Sides for Management Group Oregon and Charles Sides personally, hereinafter "Borrower."

1. **LOAN AMOUNT:** The loan amount, which Lender agrees to lend to Borrower, shall be in the sum of ONE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS (\$185,000.00)

2. **INTEREST RATE AND DUE DATE:** Borrower shall pay the balance of the loan, including interest at fifteen percent (15%) per annum on or before January 24, 2012.

3. **PAYMENT SCHEDULE AND LATE FEES:** Borrower shall make monthly installments of \$9,000, the first of such installments shall be paid on or before March 1, 2011, and subsequent installments to be paid on the same day of each and every month thereafter.

Borrower shall make a final payment of the remaining balance and interest due of approximately \$106,663.05 on or before January 24, 2012

If Borrower fails to pay to Lender \$9,000.00 per month on or before the 5th day of the month during which it is due, Lender shall assess against Borrower a late payment fee in the amount of \$50.00 per day until the full amount, to include any and all additional costs and late fees are paid in full. All payments/monies received shall first be applied to any outstanding additional costs, including late fees, then interest and finally the principle amount.

If Borrower fails to pay to Lender the remaining balance of approximately \$106,663.05, plus any and all interest, costs and late fees on or before January 24, 2012, Lender shall assess against Borrower a late payment fee in the amount of \$200.00 per day until the full payment to include principal, interest and any additional costs are paid in full. All payments/monies received shall first be applied to outstanding costs, including late fees, then interest and then the principle amount.

Borrower expressly acknowledges that Borrower shall be required to pay late fees if Borrower fails to make any payments when due pursuant to this agreement. The late fees apply not only to balloon payments but also to the final payment due pursuant to this agreement. Borrower expressly acknowledges and agrees that these late fees are not penalties but are, instead, considerations to the Lender to induce him to make the loan and further that said late fees are consideration for the loss of use by the Lender of the money which has been lent pursuant to this agreement. Borrower specifically waives any right to inquire with respect to Lender's prospective uses for monies not paid under this agreement which give rise to the entitlement of the Lender to late fees.

4. **FEES:** As further consideration for the loan, and in lieu of a monetary loan fee, Borrower



shall convey title to a steel building generally described as 300 ft by 80' wide, and including all parts, components, accessories, blue prints, plans, and/or diagrams necessary to erect said building and make it a working functional building. Further Borrower at his expense, agrees and shall deliver said building to a specific site on Lender's property located behind the Pilot/McCoy Freightliner in Brooks, OR.

5. **TERM:** The term of this loan shall be for a period not to exceed one (1) year, January 24, 2012.

6. **LOAN DISBURSEMENT:** Lender had previously given Borrower a check in the amount of \$75,000.00 on January 25, 2011 and shall give to Borrower another check for the remaining balance, after all fees/costs, to include loan fees, past due payments, recording fees, escrow fees and encumbrances are paid and after this agreement and the accompanying promissory note and additional documents have been fully executed.

7. **INSURANCE/TAXES:** Borrower shall maintain and provide proof of insurance on the building set forth in Paragraph 4 herein, showing Lender as an Additional Insured. Borrower shall also keep all property taxes due on the building current.

8. **SECURITY:** As security for this loan, Borrower pledges as collateral, the "Account" as that term is defined in ORS 79.0102(b), and derived from the Commercial Building Lease/Agreement executed between Management Group Oregon, Inc., and Oregon Child Development Coalition, Inc., on the existing commercial building located at 1687 Summer St NE, Salem, OR, and more specifically set forth in the Lease Agreement attached as Exhibit "A." Borrower shall provide Lender a complete fully executed copy, including all exhibits ("A" and "B" attached thereto), of the Lease Agreement referred to as collateral in this paragraph.

The Security Interest granted as set forth herein, shall be perfected by the filing of a properly executed UCC Financing Statement contemporaneously with the execution of this document.

Borrower further agrees to execute in his personal and corporate capacity, the promissory note in the sum of \$185,000.00 attached as Exhibit "B."

9. **LIENS:** Borrower agrees to maintain said collateral set forth in paragraph 8 herein, free and clear from any and all liens and encumbrances. However, should said property be encumbered either prior to, or subsequent to the date of the execution of this agreement, Borrower agrees to save and hold harmless Lender from any liability which may result from said encumbrances.

10. **RULE OF CONSTRUCTION:** Any rule of construction interpreting a document against its drafter shall be inapplicable.

11. **DEFAULT:** In the event that Borrower defaults with respect to the repayment of this loan, or any installment there under, Lender shall have all remedies available to him pursuant to Oregon law

and pursuant to the terms of this Loan Agreement.

12. **WAIVER**: Failure by Lender at any time to require performance by Borrower of any of the provisions hereof shall in no way affect Lender's rights hereunder to enforce the same, nor shall any waiver by Lender of any breach hereof be held to be a waiver of any succeeding breach, or a waiver of this nonwaiver clause.

13. **PLACE OF VENUE**: Both Borrower and Lender agree that any legal action, to include foreclosure or forfeiture will be filed and take place in the State of Oregon, and in a County Court System of Lender's choice.

14. **ATTORNEY FEES**: In the event a dispute arises with respect to this agreement, the prevailing party shall be entitled to recover their reasonable attorney fees and costs incurred in the enforcement of said agreement regardless of whether or not the matter is ultimately resolved by trial or other means of dispute resolution.

Borrower agrees to appear in and defend any action or proceeding purporting to affect the security rights or powers of Lender and in any suit, action or proceeding in which the Lender may appear, including any suit for the foreclosure or forfeiture of this agreement or any suit or action related to this instrument, including but not limited to its validity and/or enforceability, to pay all costs and expenses, including evidence of contractual rights and title and the Lender's attorney fees; the amount of attorney fees mentioned in Paragraph 14 in all cases shall be fixed by the trial court or the Lender, in case of forfeiture, and in the event of an appeal from any judgment or decree of the trial court, Borrower further agrees to pay such sum at the Appellate court shall adjudge reasonable as the Lender's fees on such appeal.

15. **NOTICES**: Any notices or demands to be given one party to the other as required by this Agreement or otherwise shall be sent registered or certified, return receipt requested, unless the other party has been notified of a change of address and has been received by said party prior the time of mailing of any other notice. Any such notice shall be deemed to have been delivered and given, forty-eight (48) hours after the postmark thereof. Notices shall be sent as follows:

(a) Upon the Lender - P.O. Box 20756, Keizer, OR 97307

(b) Upon the Borrower - P.O. Box 2087, Salem, OR 97308

16. **MISCELLANEOUS**: Lender shall be reimbursed for any/all costs and labor, (at his standard hourly rate of \$65.00 per hour), that he or his office staff have incurred in the collection/enforcement of this loan agreement, to include legal action/ foreclosure, repossession or forfeiture of said property.

17. **INTEGRATION**: This Agreement embodies the entire agreement of the parties hereto. Borrower agrees that Borrower has not relied upon any statements made by Lender that are not set out in

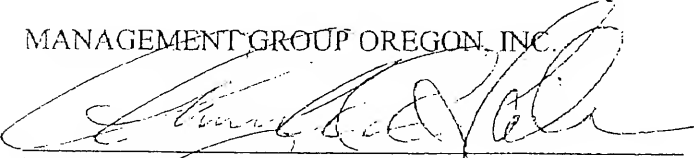
writing in this Agreement. If any portion of this Agreement is deemed to be invalid, the remainder hereof shall be given full force and effect.

18. **TIME IS OF THE ESSENCE**: Time is of the essence of this Agreement and every provision herein.

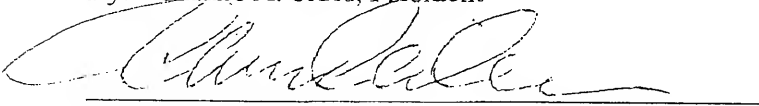
19. **ENTIRE AGREEMENT**: This agreement constitutes the entire agreement of the parties and supersedes any oral agreements or representations which may have been made by any party.

IN WITNESS WHEREOF, the parties have executed this agreement in duplicate the day and year first above written.

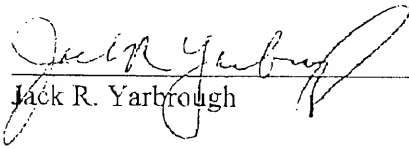
MANAGEMENT GROUP OREGON, INC.


By: Charles A. Sides, President

1-27-10
Date


Charles Sides, Personally

1-27-11
Date


Jack R. Yarbrough

1-24-11
Date



9040192911

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

William L. Ghiorso
Attorney at Law
495 State Street, Suite 500
Salem, OR 97301

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME Management Group Oregon, Inc.						
OR	1b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX	
1c. MAILING ADDRESS PO Box 2087			CITY Salem	STATE OR	POSTAL CODE 97308	COUNTRY USA
1d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION Corporation	1f. JURISDICTION OF ORGANIZATION Oregon		1g. ORGANIZATIONAL ID #, if any 213150-80 <input type="checkbox"/> NONE	

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME						
OR	2b. INDIVIDUAL'S LAST NAME Sides		FIRST NAME Charles	MIDDLE NAME A.	SUFFIX	
2c. MAILING ADDRESS PO Box 2087			CITY Salem	STATE OR	POSTAL CODE 97308	COUNTRY USA
2d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION		2g. ORGANIZATIONAL ID #, if any <input type="checkbox"/> NONE	

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE OF ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME						
OR	3b. INDIVIDUAL'S LAST NAME Yarbrough		FIRST NAME Jack	MIDDLE NAME R.	SUFFIX	
3c. MAILING ADDRESS PO Box 20756			CITY Keizer	STATE OR	POSTAL CODE 97307	COUNTRY USA

4. This FINANCING STATEMENT covers the following collateral:

The "Account" as that term is defined in ORS 79.0102(b), and more specifically the lease payments and income arising out of the Commercial Building Lease/Agreement executed August 6, 2010 between Management Group Oregon, Inc. and Oregon Child Development Coalition, Inc., for the existing commercial building located at 1687 Summer St. NE, Salem, Oregon.

5. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> LESSEE/LESSOR <input type="checkbox"/> CONSIGNEE/CONSIGNOR <input type="checkbox"/> BAILEE/BAILOB <input type="checkbox"/> SELLER/BUYER <input type="checkbox"/> AG. LIEN <input type="checkbox"/> NON-UCC FILING						
6. <input type="checkbox"/> This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)				7. See Instruction Debtor(s)		
8. OPTIONAL FILER REFERENCE DATA						

PLAINTIFF'S
EXHIBIT

F

STATE OF OREGON
Marion County Circuit Courts
SEP 30 2011
ENTERED

STATE OF OREGON
Marion County Circuit Courts
SEP 28 2011
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company, and MANAGEMENT
GROUP OF OREGON, an Oregon Corporation,
And CHARLES SIDES, an individual,

Defendants.

Case No. 11 C 19158

PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT

UTCR 5.050 – ORAL ARGUMENT

Time for Oral Argument is 30 minutes.

Official Court Reporting Services are request.

COMES NOW Plaintiff by and through his attorney, John E. Storkel, and moves this
Court for partial summary judgment against Defendants. In support of the foregoing motion,
Plaintiff will rely upon the provisions of ORCP 47, the pleadings in this action, arguments,
memoranda, declarations and exhibits.

1
2 **I. POINTS AND AUTHORITIES**

3 **A. Standards for Summary Judgment.**

4 The court is directed to render summary judgment, "if the pleadings, depositions,
5 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
6 any material fact and that the moving party is entitled to judgment as a matter of law." ORCP
7 47C.

8 The determination of whether or not there is a "genuine issue of material fact" precluding
9 summary judgment under the amendment to ORCP 47 is made on the evidence of both parties.
10 *Jones v. General Motors Corp*, 139 Or. App. 244, 256, 911 P2d 1243 (1996).

11 **B. Undisputed Facts:**

12 **1. The April 2010 Loan:** On or about April 28, 2010, (hereinafter the "April 2010
13 Loan") Defendants for value received, made and executed a loan agreement and promissory
14 note in the amount of \$350,000.00 payable to Plaintiff Yarbrough according to the terms and
15 provisions of the loan agreement and promissory note.

16 The promissory note is attached to the Declaration of Jack Yarbrough and marked as
17 Exhibit "A" Said Loan agreement is attached to the Declaration of Jack Yarbrough and marked
18 as Exhibit "B".

19 All of Defendants obligations to plaintiff under the April 2010 loan are secured by certain
20 collateral, namely, a trust deed in real property located at 1100 West Valley View Rd., Talent,
21 Oregon.

22 A copy of the trust deed is attached to the Declaration of Jack Yarbrough and marked as
Exhibit "C".

1
2 Defendants are in default under Exhibit "A," "B," "C," in the following list of particulars:

3 1. Defendants agreed to repay the April 2010, loan, including principal and interest
4 in monthly installments according to its terms, with the entire remaining balance due April 26,
5 2011, as provided in the loan agreement. Defendants have defaulted on said payments,
6 specifically Defendants have defaulted and have failed to pay the loan in full on the maturity date
7 leaving substantial principal, interest, penalties, and costs due to plaintiff on the note and
8 indebtedness. See Yarbrough Declaration.

9 2. In addition, and in lieu of loan fees, Defendants agreed to supply to Plaintiff all
10 lumber and material to build a 48' x 60' shop similar to the shop located at 8306 Wheatland Rd.
11 N, Keizer, Or. Further, Defendant agreed to pay the cost of moving a quanset hut from its
12 current location of 2159 Clearlake Rd N to the northeast corner of the same property.
13 Defendants failed to perform either promise as contractually required. See Yarbrough
14 Declaration.

15 3. In addition, and in lieu of loan fees, Defendants agreed to pay the cost to move
16 and set on foundation three homes from the general area of St. Croix/Ridge Dr. to a location
17 designated as the Evergreen property or as an alternative to this obligation defendant had the
18 option as set forth in Exhibit 1 to purchase three (3) Evergreen lots for \$35,000.00 each.
19 Defendants exercised the option to purchase the (3) Evergreen lots but Defendants failed to
20 timely perform.
21 See Yarbrough Declaration.
22

1 **2. The January 2011 Loan:** On or about January 25, 2011, (hereinafter the "January
2 2011 Loan") Defendants for value received, made and executed a loan agreement and
3 promissory note in the amount of \$185,000.00 payable to Plaintiff Yarbrough according to the
4 terms and provisions of the loan agreement and promissory note.

5 The promissory note is attached to the Declaration of Jack Yarbrough and marked as
6 Exhibit "D" Said Loan agreement is attached to the Declaration of Jack Yarbrough and marked
7 as Exhibit "E".

8 All of Defendants obligations to plaintiff under the January 2011 loan are secured by
9 certain collateral, namely, rental income arising out of a commercial building/lease between
10 Management Group Oregon, Inc., and Oregon Child Development Coalition, Inc., for
11 commercial space located at 1687 Summer St., NE, Salem, Oregon.

12 A copy of the UCC filing is attached to the Declaration of Jack Yarbrough and marked as
13 Exhibit "F".

14 Defendants are in default under Exhibit "D," "E," "F," in the following list of particulars:

15 1. Defendants agreed to make monthly installment payments to repay the January
16 2011, loan, in the amount of \$9,000.00 per month, with the entire remaining balance due January
17 24, 2012, as provided in the loan agreement. Defendants have defaulted on said monthly
18 payments, specifically Defendants have defaulted and have failed to pay any monthly payments
19 for the months of March, June, July, August, and September of 2011. See Yarbrough
20 Declaration.


2. Defendants have given plaintiff reasonable cause to become insecure or under-secured by preventing and otherwise not entering into the lease agreement identified in Exhibit “F.” thereby rendering the loan unsecured See Yarbrough Declaration.

3. In addition, and in lieu of loan fees, Defendants agreed to convey title to a steel building generally described as 300' x 80' wide, including all parts, components, accessories, blue prints, plans, and/or diagrams necessary to erect said building and make it a working functional building. Further, Defendants agreed to incur all expense and deliver the building to a specific site on Plaintiff's property located behind Pilot/McCoy Freightliner in Brooks, Or. Defendants have failed to perform either promise. See Yarbrough Declaration.

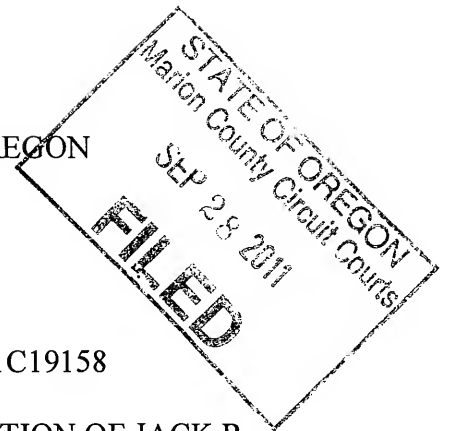
II. CONCLUSION

Plaintiff has a valid and subsisting security interest in the collateral described herein. Because there is no question of fact regarding the status of the default of Defendants, Plaintiffs is entitled to a judicial decree of this court finding Defendants in material breach and foreclosing all of the interest of Defendants in the collateral and for other appropriate relief. For the reasons set forth herein, this Court should grant Plaintiff's Motion for Partial Summary Judgment

DATED : September 28, 2011


John E. Storkel, OSB. No. 850871
Attorney for Plaintiff

1
2 IN THE CIRCUIT COURT OF THE STATE OF OREGON
3 FOR THE COUNTY OF MARION



4 JACK R. YARBROUGH,)

) Case No. 11C19158

5)
6 Plaintiff,)

) DECLARATION OF JACK R.
) YARBROUGH IN SUPPORT OF
) PLAINTIFFS' MOTION FOR
) PARTIAL SUMMARY
) JUDGEMENT

7 v.)

8 ASPEN PACIFIC CITY, LLC, an Oregon)
9 Limited Liability Company, And MANAGEMENT)
10 GROUP OF OREGON, an Oregon Corporation,)
11 And CHARLES SIDES, an individual)

12 Defendants.)

13 STATE OF OREGON)

14) ss.

15 County of Marion)

16 I, Jack Ray Yarbrough, do hereby state as follows:

17 1. I am the Plaintiff herein. I make this declaration based upon my personal
18 knowledge.

19 2. Attached herein as Exhibit "A" is a Promissory Note executed between Jack R.
20 Yarbrough, and Charles Sides, personally and Charles Sides for Aspen Pacific City, LLC, dated
21 April 28, 2010.

22 3. Attached herein as Exhibit "B" is a Loan Agreement executed between Jack
R. Yarbrough, and Charles Sides, personally and Charles Sides for Aspen Pacific City, LLC,
dated April 28, 2011.

1 4. Attached herein as Exhibit "C" is a trust deed executed by Charles Sides, on
2 behalf of Aspen Pacific City, LLC, dated May 3, 2010.

3 5. Attached herein as Exhibit "D" is a Promissory Note executed between Jack R.
4 Yarbrough, and Charles Sides, personally and Charles Sides for Management Group Oregon,
5 Inc., dated January 24, 2011.

6 6. 3. Attached herein as Exhibit "E" is a Loan Agreement executed between Jack
7 R. Yarbrough, and Charles Sides, personally and Charles Sides for Management Group Oregon,
8 Inc., dated January 24, 2011.

9 7. Attached as Exhibit "F" is a UCC filing. Exhibit "F" creates a first lien on
10 Defendants' interest in rental income as follows:

11 "The "Account" as that term is defined in ORS 79.0102(b) and more specifically the
12 lease payments and income arising out of the Commercial Building Lease/Agreement
13 executed August 6, 2010 between Management Group Oregon, Inc. and Oregon Child
Development Coalition, Inc., for the existing commercial building located at 1687 Summer
St. NE, Salem, Oregon "

14 8. Defendants are in default under Exhibit "A," "B," and "C," in the following non-
15 exclusive list of particulars:

16 A. Defendants agreed to repay the April 2010, loan, including principal and interest
17 according to its terms, with the entire remaining balance due April 26 2011 as provided in the
18 loan agreement. Defendants have defaulted on said payments, specifically Defendants have
19 defaulted and have failed to pay the loan in full on the maturity date leaving substantial principal,
20 interest, penalties, and costs due on the note and indebtedness.
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1 B. In addition, and in lieu of loan fees, Defendants agreed to supply to Plaintiff all
2 lumber and material to build a 48' x 60' shop similar to the shop located at 8306 Wheatland Rd.
3 N, Keizer, Or. Further, Defendant agreed to pay the cost of moving a quanset hut from its
4 current location of 2159 Clearlake Rd N to the northeast corner of the same property.
5 Defendants failed to perform either promise as contractually required.

6 C. In addition, and in lieu of loan fees, Defendants agreed to pay the cost to move
7 and set on foundation three homes from the general area of St. Croix/Ridge Dr. to a location
8 designated as the Evergreen property or as an alternative to this obligation defendants had the
9 option as set forth in Exhibit 1 to purchase the three (3) Evergreen lots for \$35,000.00 each.
10 Defendants exercised the option to purchase the (3) Evergreen lots but Defendants failed to
11 timely perform.

12 9. Defendants are in default under Exhibit "D" and "E," in the following non-
13 exclusive list of particulars:

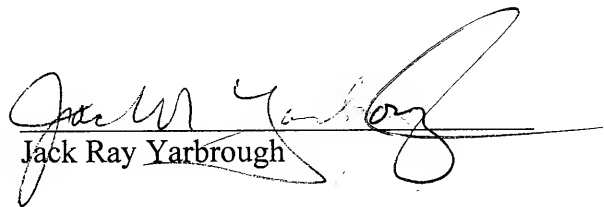
14 A. Defendants agreed to repay the April 2010, loan, including principal and interest
15 in monthly installments of \$9,000.00 according to its terms, with the entire remaining balance
16 due as provided in the loan agreement On January 24, 2012. Defendants have defaulted on said
17 payments, specifically Defendants have defaulted and have failed to pay the monthly payments
18 For the months of March, June, July, August, and September of 2011.

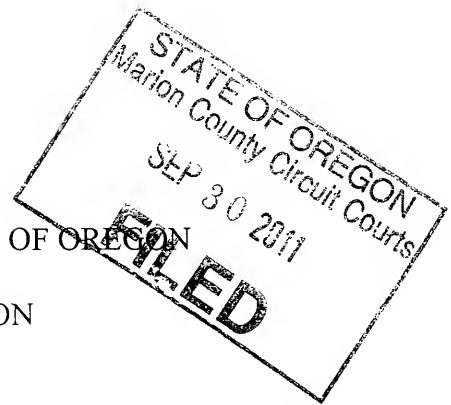
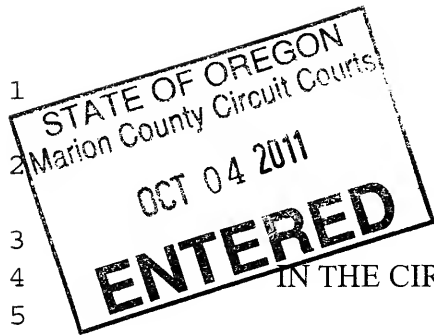
19 B. Defendants have given the lender reasonable cause to become insecure or under-
20 secured by preventing and otherwise not entering into the lease agreement identified in Exhibit
21 "F" thereby rendering the loan unsecured.
22

1 C. In addition, and in lieu of loan fees, Defendants agreed to convey title to a steel
2 building generally described as 300' x 80' wide, including all parts, components, accessories,
3 blue prints, plans, and/or diagrams necessary to erect said building and make it a working
4 functional building. Further, Defendants agreed to incur all expense and deliver the building to a
5 specific site on Plaintiff's property located behind Pilot/McCoy Freightliner in Brooks, Or.
6 Defendant has failed to perform either promise.

7 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST
8 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE
9 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

10 DATED this 28th day of September, 2011.

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13 Jack Ray Yarbrough
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

vs.

ASPEN PACIFIC CITY, LLC, an Oregon
limited liability company; MANAGEMENT
GROUP OREGON, INC., an Oregon
corporation; and CHARLES SIDES, an
individual,

Defendants.

Case No. 11C 19158

DEFENDANTS' ANSWER AND
AFFIRMATIVE DEFENSES

Defendants Aspen Pacific City, LLC (hereinafter "Aspen"), Management Group
Oregon, Inc. (hereinafter "MGO"), and Charles Sides (hereinafter "Sides") answer Plaintiff's
Complaint as follows.

1.

Admits Paragraphs 1, 2, and 3.

2.

In response to Paragraph 4, admits that Defendant Sides is a resident of Marion
County, Oregon, and further admits that some of the actions taken by Sides were as agent for
Defendants Aspen and MGO. Except as expressly admitted herein, Defendants deny the
remainder of the allegations in Paragraph 4.

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Admit Paragraphs 5 and 6.

Admit Paragraphs 7 and 8.

In response to Paragraph 9, admits that Defendant Sides pledged as security the account evidenced in Exhibit "F" for the January loan. Defendants deny the balance of Paragraph 9 in its entirety.

Defendants deny Paragraph 10.

Defendants deny that there is anything left due and owing to Plaintiff on account of this loan. Defendants further allege that Plaintiff has failed to clear the location for delivery of the steel building and Defendants stand ready, willing, and able to deliver the steel building as soon as the location is cleared.

Admit that the Notes and other loan documents provide that the prevailing party is entitled to recover reasonable attorney fees and all reasonable costs and expenses. Defendants deny that Plaintiff is entitled to an award of their attorney fees and allege that Defendants are entitled to an award of their attorney fees as the prevailing party.

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9.

In response to Paragraph 13, Defendants reallege their admissions and denials
as set forth above and below.

10.

In response to Paragraph 14, Defendants deny this paragraph in its entirety.

11.

In response to Paragraph 15, Defendants reallege their admissions and denials
as set forth above and below.

12.

Defendants deny Paragraph 16. Defendants further allege that said loan has been
paid in full.

13.

In response to Paragraph 17, Defendants reallege their admissions and denials
as set forth above and below.

14.

In response to Paragraph 18, Defendants admit that the building has not been
delivered, but deny that the site for the building is ready for placement of the building as set
forth in Paragraph 7 above.

15.

In response to Paragraph 19, Defendants reallege their admissions and denials
as set forth above and below.

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16.

In response to Paragraph 20, admit that Defendant Sides personally guaranteed all obligations, but deny that anything is owed on account of the January loans and further alleges that the April loan is current and that all monthly installments have been paid.

17.

In response to Paragraph 21, Defendants reallege their admissions and denials as set forth above and below.

18.

Defendant Sides denies Paragraphs 22 and 23 in their entirety. These paragraphs make no allegations against Defendants Aspen or MGO.

* * * * *

FOR A FIRST AFFIRMATIVE DEFENSE, Defendants allege as follows:

(FAILURE TO STATE A CLAIM)

19.

The allegations contained in Plaintiff's Complaint fail to allege ultimate facts sufficient to constitute a claim for relief on the April loan agreement.

* * * * *

FOR A SECOND AFFIRMATIVE DEFENSE, Defendants allege as follows:

(WAIVER)

20.

Plaintiff's claims are barred by the doctrine of waiver. Defendants further allege that Plaintiff has waived the time of the essence clause in the loan documents.

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FOR A THIRD AFFIRMATIVE DEFENSE, Defendants allege as follows:

(RESERVATION OF RIGHTS)

21.

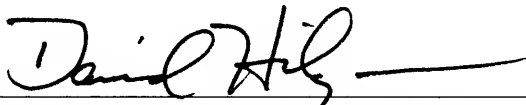
Defendants reserve the right to allege further affirmative defenses as discovery continues.

WHEREFORE, Defendants pray for a Judgment from this Court as follows:

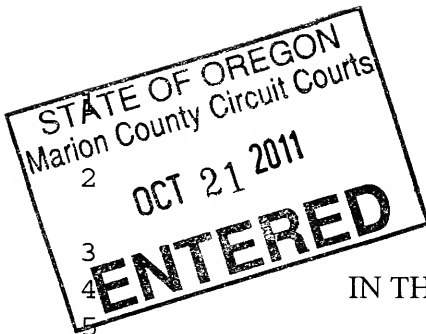
1. Awarding Defendants their reasonable attorney fees and costs and disbursements incurred herein pursuant to the loan documents.
2. For a dismissal of all claims against Defendants.

DATED this 30th day of September, 2011.

LAW OFFICES OF DAVID HILGEMANN

By: 
David A. Hilgemann, OSB #721215
Of Attorneys for Defendants

Trial Attorney: David A. Hilgemann, OSB #721215



STATE OF OREGON
MARION COUNTY COURTS
OCT 19 2011
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

vs.

ASPEN PACIFIC CITY, LLC, an Oregon
limited liability company; MANAGEMENT
GROUP OREGON, INC., an Oregon
corporation; and CHARLES SIDES, an
individual,

Defendants.

)
) Case No. 11C 19158
)
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) DEFENDANTS' RESPONSE
) OPPOSING PLAINTIFF'S MOTION
) FOR PARTIAL SUMMARY
) JUDGMENT
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Defendants hereby respond in opposition to Plaintiff's Motion for Partial
Summary Judgment. Defendants' Response is supported by the Points and Authorities set forth
herein, as well as the Declaration of Defendant Charles Sides, which is attached hereto as
Exhibit "A."

POINTS AND AUTHORITIES

Procedural Background

In his Complaint, Plaintiff alleges that he loaned money to Defendants in two
separate transactions:

(a) The "April 2010 Loan" in the amount of \$350,000.00 made to
Defendants Aspen Pacific City, LLC, and Charles Sides, with a stated balloon payoff date of
April 26, 2011. The Loan Agreement requires Defendants to provide Plaintiff with lumber to

1 build a 48' x 60' shop, and to pay the cost of moving a quonset hut from 2159 Clearlake Road
2 N. to the northeast corner of the same property. Finally, the Loan Agreement requires
3 Defendants to move three homes from St. Croix/Ridge Drive to Plaintiff's Evergreen property.
4 The loan is secured by a First Deed of Trust on property owned by Defendants located at 1100
5 W. Valley View Road, Talent, Oregon. The April 2010 Loan was personally guaranteed by
6 Defendant Charles Sides.

7 (b) The "January 2011 Loan" in which Plaintiff loaned the sum of
8 \$185,000.00 to Defendants Management Group Oregon and Charles Sides, with a balloon
9 payoff date of January 24, 2012. Under the terms of the January, 2011, loan, Defendants agreed
10 to convey title to a 80' x 300' steel building, and to deliver said building to a specific site on
11 Plaintiff's property located in Brooks, Oregon. The loan is secured by Defendants' pledge of
12 rental income derived from a lease in which Defendant Management Group Oregon on a
13 commercial building located at 1687 Summer Street NE, Salem, Oregon is lessor. The January
14 2011 Loan was personally guaranteed by Defendant Charles Sides.

15 Plaintiff's Complaint alleges Defendants defaulted under various provisions of
16 the two loans, and includes the following "causes of action":

- 17 (1) Foreclosure of Trust Deed on real property pursuant to
18 the April 2010 Loan (See Plaintiff's Complaint,
19 Paragraphs 13 - 14);
20
21 (2) Action for Money Damages, and specific performance of
22 the January 2011 Loan (See Plaintiff's Complaint,
23 Paragraphs 15 - 18);
24
25 (3) Action on Personal Guarantees of Defendant Charles
26 Sides on the April 2010 and January 2011 Loans (See
27 Plaintiff's Complaint, Paragraphs 19 - 20); and
28

29 /////

1 (4) Fraud and misrepresentation on the January 2011 Loan
2 (See Plaintiff's Complaint, Paragraphs 21 - 23).
3

4 Defendants' Answer and Affirmative Defenses includes the following
5 allegations:

6 (1) The January 2011 Loan has been paid in full, and Defendants were ready,
7 willing, and able to deliver the steel building to Plaintiff, but Plaintiff failed to clear the location
8 for delivery of the steel building. (See Defendants' Answer and Affirmative Defenses,
9 Paragraph 7);

10 (2) The April 2010 Loan is current and all monthly installments have been
11 paid. (See Defendants' Answer and Affirmative Defenses, Paragraph 16); and

12 (3) The Plaintiff waived the "time is of the essence" clause in the April 2010
13 and January 2011 Loans. (See Defendants' Answer and Affirmative Defenses, Paragraph 20).

14 **Plaintiff's Motion for Partial Summary Judgment**

15 In his Motion for Partial Summary Judgment, Plaintiff seeks "a judicial decree
16 of this Court finding Defendants in material breach and foreclosing all of the interest of
17 Defendants in the collateral and for other appropriate relief." See Plaintiff's Motion for Partial
18 Summary Judgment, Page 5, Lines 13 - 14.

19 **Summary of Defendants' Responses**

20 **Declarations of Defendant Charles Sides:** The Declaration of Defendant
21 Charles Sides contains the following statements, made under oath and penalty of perjury:

22 (1) Defendants have paid the January 2011 Loan in full. A true copy of the
23 ledger sheet for the January 2011 Loan, reflecting payments made and the balance of the loan,
24 is attached to the Declaration of Defendant Charles Sides as Exhibit "A-1".

1 (2) Defendants have made regular monthly payments on the April 2010 Loan
2 beginning June 2, 2010, through August 8, 2011. Plaintiff has accepted and negotiated each of
3 the monthly payments made on the April 2010 Loan. A copy of the ledger sheet showing the
4 dates and amounts of payments made by Defendants on the April 2010 Loan is attached to the
5 Declaration of Defendant Charles Sides as Exhibit "A-2".

6 (3) Defendants were ready, willing, and able to provide Plaintiff with the
7 necessary lumber to build a 48' x 60' shop, and to pay the cost of moving a quonset hut from its
8 current location on Plaintiff's 2159 Clearlake Road N. property to the northeast corner of the
9 same property. However, Plaintiff failed to prepare his properties for the construction of the
10 48' x 60' shop, or to move the quonset hut at Plaintiff's 2159 Clearlake Road N. property.

11 (4) At the time the January 2011 Loan was entered, Defendants were ready,
12 willing, and able to convey title to an 80' x 300' steel building, and to deliver said building to
13 a specific site on Plaintiff's property located in Brooks, Oregon. However, Plaintiff failed to
14 prepare the property for the delivery of said building.

15 (5) Defendants are ready, willing, and able to move and set on foundations
16 three homes from the St. Croix/Ridge Drive area to Plaintiff's Evergreen property. However,
17 the designated lots on Plaintiff's Evergreen property are not completed, buildable lots, and are
18 not connected to water, sewer, and utilities. As a result of these facts, and the slope of the lots,
19 the City of Keizer will not issue permits to locate homes on said lots.

20 **Genuine Issues of Material Fact:** Plaintiff's Motion for Partial Summary
21 Judgment should be denied because there are genuine issues of material fact for the Court to
22 resolve on each of the following issues:

23 /////

1 (1) Whether the January 2011 Loan has been paid in full, as alleged by
2 Defendants;

3 (2) Whether Plaintiff waived the time is of the essence clause on the April
4 2010 Loan by accepting monthly payments from Defendants on that loan after April 26, 2011;

5 (3) Whether Plaintiff waived his right to claim that Defendants breached the
6 terms of the April 2010 Loan concerning Defendants' obligation to supply lumber to build a 48'
7 x 60' foot shop building for Plaintiff, after Defendants offered to supply said lumber, but
8 Plaintiff had failed to prepare his property for construction of said shop building, and
9 concerning Defendants' obligation to move the quonset hut on Plaintiff's 2159 Clearlake Road
10 N. property, when Plaintiff failed to prepare the site to which the quonset hut was to be moved;
11 and

12 (4) Whether Plaintiff waived his right to claim that Defendants breached the
13 terms of the January 2011 Loan concerning Defendants' obligation to deliver a steel building
14 to Plaintiff's property, after Defendants were prepared to deliver the steel building, but Plaintiff
15 had failed to prepare his property for delivery of the steel building by Defendants.

16 (5) Whether Plaintiff waived his right to claim that Defendants breached the
17 terms of the April 2010 Loan concerning Defendants' obligation to move and set on foundations
18 three homes from the St. Croix/Ridge Drive area to Plaintiff's Evergreen property, when
19 Defendants are ready, willing, and able to do so, but the designated lots on Plaintiff's Evergreen
20 property are not completed, buildable lots, and the City of Keizer will not issue permits to
21 locate homes on said lots.

22 ////

23 ////

1 Each of the above issues are “genuine issues of material facts” for the Court to
2 resolve at trial. Therefore, Plaintiff is **not** entitled to Judgment as a matter of law.

3 **THE LAW**

4 **Standard for Review in Motion for Summary Judgment:** ORCP 47C sets
5 forth the standard for summary judgment:

6 “The Court shall enter judgment for the moving party if the pleadings,
7 depositions, affidavits, and admissions on file show that there is no
8 genuine issue as to any material fact and that the moving party is entitled
9 to a judgment as a matter of law. No genuine issue as to a material fact
10 exists if, based upon the record before the Court viewed in a manner
11 most favorable to the adverse party, no objectively reasonable juror
12 could return a verdict for the adverse party on the matter that is the
13 subject of the motion for summary judgment.”
14

15 In a motion for summary judgment, the moving party has the burden of showing
16 there are no genuine issues of fact, and that they are entitled to judgment as a matter of law.
17 This applies even as to those issues on which the non-moving party would have the burden at
18 trial. Doe v. American Red Cross, 322 Or 502, 505, 910 P2d 364 (1996). Furthermore, the
19 Court is to view the evidence, **and all reasonable inferences that may be drawn from that**
20 **evidence** in the light most favorable to the non-moving party. Id. 322 Or at 505. (Emphasis
21 added.) See also Grady v. Cedar Side Inn, Inc., 330 Or 42, 44, 997 P2d 197 (2000).

22 No genuine issue of material fact exists, and summary judgment is appropriate
23 **only if** no objectively reasonable juror could return a verdict for the party opposing summary
24 judgment. Varner v. Eves, 164 Or App 66, 70, 990 P2d 357 (1999), citing Jones v. General
25 Motors Corporation, 325 Or 404, 414, 939 P2d 608 (1997). (Emphasis added.)

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1 Under ORCP 47C, summary judgment is appropriate only when the moving
2 party can show that the pleadings, depositions, and affidavits raise no genuine issue of material
3 fact, and that the moving party is entitled to judgment as a matter of law. When the evidence
4 is in dispute on an issue of material fact, summary judgment is precluded. Gross v.
5 Pydynkowski, 144 Or App 518, 521 - 22, 927 P2d 630 (1996). (Emphasis added.) See also
6 Doughty v. Birkholtz, 156 Or App 89, 94, 964 P2d 1108 (1998). The determination of whether
7 there is a genuine issue of material fact is made on the evidence submitted by both parties.
8 Flaningam v. Flaningam, 145 Or App 432, 435, 929 P2d 1084 (1996). If there are disputes in
9 the relevant factual evidence submitted by the parties, the Court must read the record in the light
10 most favorable to the non-moving party, and review the evidence to determine whether an
11 objectively reasonable juror could return a verdict in favor of the non-moving party on the issue
12 of the Motion. Miller v. McDonald's Corp., 154 Or App 274, 276, 945 P2d 1107 (1997).

13 The Oregon Court of Appeals has summarized the court's role in motions for
14 summary judgment as follows:

15 "In determining whether summary judgment is proper, it is not our job
16 to decide issues of fact, but solely to determine if there are material facts
17 to decide. ORCP 47C; Jones v. General Motors Corp., 325 Or at 420.
18 In so doing, we review the evidence and all reasonable inferences in the
19 light most favorable to [the non-moving party] to determine if only one
20 reasonable conclusion may be drawn from it. Id. **If not, then summary**
21 **judgment is improper.**" Oregon Life and Health v. Inter-Regional
22 Financial, 156 Or App 485, 491, 967 P2d 880 (1998). (Emphasis
23 added.)

24
25 "Consistent with that role, **when a trial court is confronted with a**
26 **non-moving party's inconsistent statements, it may not evaluate the**
27 **credibility of an explanation to resolve the factual conflict.**" Edwards
28 v. Saleen-Degrange, 161 Or App 156, 165 984 P2d 854, modified on
29 other grounds, 162 Or App 671, 986 P2d 667 (1999). (Emphasis added).
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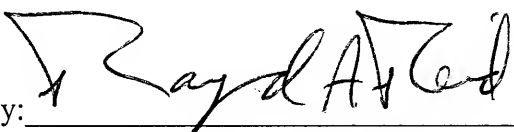
CONCLUSION

For the reasons stated herein, this Court should deny Plaintiff's Motion for Partial Summary Judgment because there are genuine issues of material fact, and Plaintiff is **not** entitled to judgment as a matter of law thereon.

DATED this 19th day of October, 2011.

Respectfully submitted,

LAW OFFICES OF DAVID HILGEMANN

By: 
Raymond A. Reid, OSB #843313
Of Attorneys for Defendants

Trial Attorney: David A. Hilgemann, OSB #721215

OCT 19 2011

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MARION COUNTY

JACK R. YARBROUGH,)
) Case No. 11C 19158
Plaintiff,)
vs.) DECLARATION OF DEFENDANT
) CHARLES SIDES – EXHIBIT “A”
ASPEN PACIFIC CITY, LLC, an Oregon)
limited liability company; MANAGEMENT)
GROUP OREGON, INC., an Oregon)
corporation; and CHARLES SIDES, an)
individual,)
Defendants.)

I, Charles Sides, being first duly sworn on oath, do state as follows:

1. I am one of the named Defendants in the above-referenced lawsuit. I am a principal in Defendants Aspen Pacific City, LLC, and in Management Group Oregon, Inc. I make this Declaration in support of Defendants’ Response Opposing Plaintiff’s Motion for Partial Summary Judgment. I have personal knowledge of the facts set forth herein.

2. Defendants have paid the full unpaid balance of the January 2011 Loan to Plaintiff. A true copy of the ledger sheet for the January 2011 Loan, reflecting payments made and the balance of the loan, is attached to this Declaration s Exhibit “A-1”.

3. Defendants have made regular monthly payments on the April 2010 Loan beginning June 2, 2010, through August 8, 2011. On information and belief, Plaintiff has accepted and negotiated each of the monthly payments made by Defendants on the April 2010 Loan. A copy of the ledger sheet showing the dates and amounts of payments made by Defendants on said loan is attached to this Declaration as Exhibit “A-2”.

1 4. Defendants were ready, willing, and able to provide Plaintiff with the
2 necessary lumber to build a 48' x 60' shop, and to pay the cost of moving a quonset hut from its
3 current location on Plaintiff's 2159 Clearlake Road N. property to the northeast corner of the
4 same property. However, Plaintiff failed to prepare his properties for the construction of the
5 48' x 60' shop, or to move the quonset hut at Plaintiff's 2159 Clearlake Road N. property.

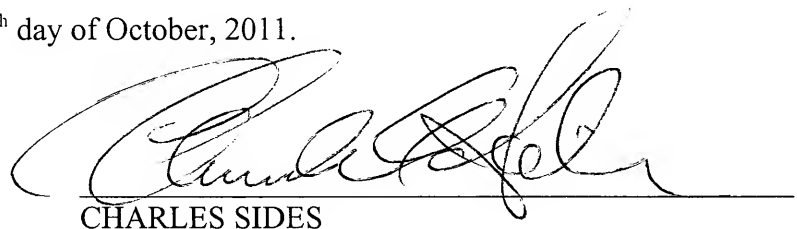
6 5. At the time the January 2011 Loan was entered, Defendants were ready,
7 willing, and able to convey title to an 80' x 300' steel building, and to deliver said building to
8 a specific site on Plaintiff's property located in Brooks, Oregon. However, Plaintiff failed to
9 prepare that property for the delivery of said building.

10 6. Defendants are ready, willing, and able to move and set on foundations
11 three homes from the St. Croix/Ridge Drive area to Plaintiff's Evergreen property. However,
12 the designated lots on Plaintiff's Evergreen property are not completed, buildable lots, and are
13 not connected to water, sewer, and utilities. As a result of these facts, and the slope of the lots,
14 the City of Keizer will not issue permits to locate homes on said lots.

15 7. **I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE**
16 **TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND I UNDERSTAND**
17 **THIS DECLARATION IS MADE FOR USE AS EVIDENCE IN COURT AND IS**
18 **SUBJECT TO PENALTY FOR PERJURY.**

19 DATED this 19th day of October, 2011.

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CHARLES SIDES

Loan to Charles A. Sides
 Rate 15%
 face value = 185,000

	Cash Out	Interest Due	Principal Applied	Payment Amount	Balance
26-Jan-11	75,000.00				75,000.00
1-Feb-11		184.93	(184.93)		75,184.93
1-Mar-11		865.14	(865.14)		76,050.07
14-Mar-11	110,000.00	406.29	(406.29)		186,456.37
4-Apr-11		1,609.14	7,390.86	\$9,000.00	179,065.51
12-May-11		2,796.37	6,203.63	\$9,000.00	172,861.88
1-Jun-11		1,420.78	(1,420.78)		174,282.66
20-Jun-11		1,360.84	(1,360.84)		175,643.50
23-Jun-11		216.55	49,783.45	\$50,000.00	125,860.04
30-Jun-11		362.06	126,291.99	\$126,654.05	(431.94)

185,000.00	9,222.11	185,431.94	194,654.05
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EXHIBIT A-1
 PAGE 1 of 1

Loan to Charles A. Sides
 Rate 15%
 face value = 350,000

	Cash Out	Interest Due	Principal Applied	Payment Amount	Balance	Accrued Interest
27-Apr-10	350,000.00				350,000.00	
1-Jun-10		5,034.25			355,034.25	5,034.25
2-Jun-10		145.90		4,375.00	350,805.15	805.15
1-Jul-10		4,180.83		4,375.00	350,610.98	610.98
1-Aug-10		4,466.69			355,077.67	5,077.67
10-Aug-10		1,313.30		4,350.00	352,040.97	2,040.97
1-Sep-10		3,182.84			355,223.80	5,223.80
7-Sep-10		875.89		4,355.00	351,744.70	1,744.70
1-Oct-10		3,469.26			355,213.96	5,213.96
8-Oct-10		1,021.85		\$4,375.00	351,860.81	1,860.81
1-Nov-10		3,470.41			355,331.22	5,331.22
9-Nov-10		1,168.21		\$4,375.00	352,124.43	2,124.43
1-Dec-10		3,183.59			355,308.02	5,308.02
6-Dec-10		730.08		\$4,365.00	351,673.11	1,673.11
1-Jan-11		3,757.60			355,430.71	5,430.71
7-Jan-11		876.40		\$4,375.00	351,932.11	1,932.11
1-Feb-11		3,615.74			355,547.85	5,547.85
8-Feb-11		1,022.81		\$4,375.00	352,195.66	2,195.66
1-Mar-11		3,039.50			355,235.16	5,235.16
5-Mar-11		583.95		\$4,375.00	351,444.11	1,444.11
1-Apr-11		3,899.59			355,343.69	5,343.69
7-Apr-11		876.19		\$4,375.00	351,844.88	1,844.88
1-May-11		3,470.25			355,315.13	5,315.13
6-May-11		730.10		\$4,375.00	351,670.23	1,670.23
1-Jun-11		3,757.57			355,427.81	5,427.81
4-Jun-11		438.20		\$4,375.00	351,491.01	1,491.01
1-Jul-11		3,900.11			355,391.11	5,391.11
15-Jul-11		2,044.72		\$4,375.00	353,060.83	3,060.83
1-Aug-11		2,466.59			355,527.42	5,527.42
8-Aug-11		1,022.75		\$4,375.00	352,175.17	2,175.17
<hr/>						
	350,000.00	67,745.17	-	65,570.00		

EXHIBIT A-2
 PAGE 1 of 1

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John E. Storkel
Attorney at Law
1415 Liberty Street SE
Salem, OR 97302
FAX No. 503-375-4214
Of Attorneys for Plaintiff

LAW OFFICES OF DAVID HILGEMANN

By:

29
30

NOV 22 2011

FILED

NOV 20 2011 IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company, and
MANAGEMENT GROUP OF OREGON, an
Oregon Corporation, and CHARLES
SIDES, an individual,

Defendants.

Case No. 11C19158

PLAINTIFF'S SWORN
PETITION FOR ISSUANCE
FOR PROVISIONAL PROCESS

State of Oregon)
County of Marion) ss.

1.

Plaintiff moves the court for an order granting immediate issuance of a restraining order, restraining Defendants and each other person in possession and control of the collateral and rent proceeds received and held by Defendants, specifically all rent checks from the current collateralized property located at 1100 West Valley View Rd., Talent, Oregon, and all income from the lease payments arising out of the commercial building located at 1687 Summer St. NE., Salem, Oregon, from using or transferring or otherwise disposing of such rent monies until further order of this court.

POINTS AND AUTHORITIES

2.

ORCP 83 provides that a restraining order may issue where the facts tend to establish that there is substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place claimed property, inter alia, in danger of destruction or concealment, and that without restraint immediate and irreparable injury, damage, or loss will occur.

3.

The name the Defendants are as set forth in the caption. The address for the Defendants is 245 13th St. NE Salem, Oregon 97301. The underlying claims are not based upon a consumer transaction.

A. The April 2010 Loan.

In the present matter On or about April 28, 2010, (hereinafter the “ April 2010 Loan”) Defendants for value received, made and executed their promissory note in the amount of \$350,000.00 payable to Plaintiff Yarbrough Enterprises according to the terms and provisions of the promissory note. On about April 28, 2010, Defendants entered into a Loan Agreement with Yarbrough Enterprises for the sum of \$350,000.00. Said financial obligations are secured by a Deed of Trust upon certain real property executed as part of the loan transaction.

Plaintiffs have performed all conditions, covenants and promises under the loan agreements. All amounts under the note and loan documents became immediately due and

1 payable on April 26, 2011. The note and obligations of Defendants pursuant to the loan
2 documents have not been paid in full as required and the Defendants are now in default.

3 In addition, and relevant to this proceeding, Defendants promised to pay monthly
4 installments of \$4,375.00 and further expressly pledged to lender "all rent checks for the current
5 rent amounts from the renters at the collateralized property-1100 West Valley View Rd., Talent,
6 OR until this loan is paid in full." Although the subject property is rented, Defendants are
7 neither making the monthly installment or paying the rental income to Plaintiff.

8
9 **B. The January 2011 Loan.**

10 On or about January 25, 2011, (hereinafter the "January 2011 Loan") Defendants for
11 value received, made and executed a loan agreement and promissory note in the amount of
12 \$185,000.00 payable to Plaintiff Yarbrough according to the terms and provisions of the loan
13 agreement and promissory note.

14 All of Defendants obligations to plaintiff under the January 2011 loan are secured by
15 certain collateral, namely, rental income arising out of a commercial building/lease for
16 commercial space located at 1687 Summer St., NE, Salem, Oregon.

17
18 Defendants agreed to make monthly installment payments to repay the January 2011,
19 loan, in the amount of \$9,000.00 per month, with the entire remaining balance due January 24,
20 2012, as provided in the loan agreement. Defendants also pledged all income from the
21 commercial lease on the property. Defendants have defaulted on said monthly payments, and
22 have not paid any of the rental income which they are receiving from the commercial tenant.

1
2 Defendants are taking and concealing the rental incomes set forth herein, in breach of
3 their contract obligations, which conduct regarding the claimed property, places the property in
4 danger of loss or concealment, and that without restraint immediate and irreparable injury,
5 damage, or loss will occur to the Plaintiff.

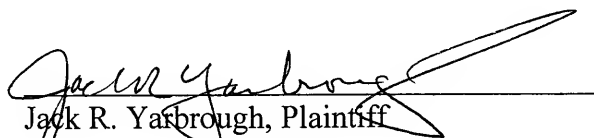
6 4.

7 In addition to the foregoing, under ORCP 84 plaintiff moves the court for an order
8 requiring Defendants and all other persons claiming an interest in the above-described property
9 to appear and show cause why provisional process should not issue against such property of
10 Defendants in the form of a writ of attachment.

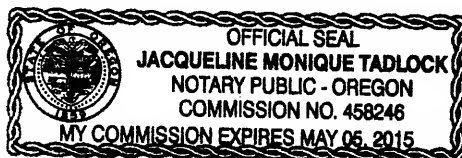
11 5.


12 These motions are supported by the court's records and files herein, including plaintiff's
13 complaint; Plaintiff's motion for partial summary judgment and this sworn petition of Jack R.
14 Yarbrough.


15
16 DATED this 22ND day of November, 2011.

17 
18 Jack R. Yarbrough, Plaintiff

19 Subscribed and sworn to before me this 22ND day of November 2011.



20 
21 Notary Public for Oregon
22 My commission expires:

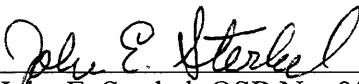
May 5, 2015 
John E. Storkel
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, John E. Storkel, hereby certify that on November 22, 2011 I served a certified true copy of the attached Plaintiff's Sworn Petition For Issuance of Provisional Process upon counsel for Defendant by placing said copy in the United States Mail, postage pre-paid and addressed as follows:

David Hilgemann
Attorney at Law
530 Center St NE Suite 700
Salem, Oregon 97301-3740
Counsel for Defendant

Dated this 22nd day of November, 2011



John E. Storkel, OSB No. 850871
Attorney for Plaintiff

STATE OF OREGON
MARION COUNTY COURTS
DEC 02 2011
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK RAY YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company, and MANAGEMENT
GROUP OF OREGON, an Oregon Corporation,
And CHARLES SIDES, an individual,

Defendants.

Case No. 11C19158

MOTION FOR SANCTIONS

(Expedited Oral Argument
Requested)

COMES NOW Plaintiff Jack Ray Yarbrough, by and through his attorney John E.

Storkel, and moves this court for sanctions against Defendants and their attorney's David

Hilgemann and Ray Reid, as further described herein, and in support of the same offers the

following Summary of Argument, Relevant Facts, Points and Authorities and Conclusions of

Law.

//

1 //

2 **MOTION**

3 Plaintiff hereby moves the court for an order imposing sanctions upon Defendants and
4 their counsel, pursuant to the court's inherent power, striking Defendants' pleadings and
5 entering a default judgment in favor of Plaintiff along with Plaintiff's attorney fees to be
6 determined pursuant to ORCP 68, and Plaintiff's costs and disbursements.

7 In addition, Plaintiff moves the court for an order imposing upon Defendants and their
8 attorneys monetary sanctions for false certification under ORCP 17, equal to the amount of
9 Plaintiff's attorney fees expended in defending against the motion pursuant to ORCP 68,
10 estimated at \$5,000.00, and for \$25,000.00 as an amount sufficient to deter such conduct in the
11 future.

12 This motion is based upon ORCP 17, the inherent power of the court, the below stated
13 Relevant Facts, Points and Authorities and Conclusions of Law, and the court's file herein.

14 **SUMMARY OF ARGUMENT**

15 Plaintiff has carefully and specifically pointed out the significant and material defects in
16 the October 19, 2011 declaration of defendant, Sides. This issue has been discussed by phone
17 with both Attorney's Reid and Hilgemann. But in an abundance of caution two letters from
18 plaintiff one dated October 24, 2011 and one dated November 4, 2011 which specifically
19 highlight the false or perjured statement. Exhibits E and F In response to these requests the
20 Defendants and their attorneys have refused to make any corrections to the significant and
21 material false or perjured statement in the October 19, 2011 declaration which they prepared
22 with their client. Exhibit B

1 Attorney's Reid and Hilgemann, while acting as attorney for Defendants, participated in
2 the making of a false swearing in a signed pleading to this Court in the Declaration in Support of
3 Defendants' Response to Plaintiff's Motion for Partial Summary Judgment. (See Exhibit A
4 October 19, 2011 Sides Declaration). Thus, Defendants by and through their attorney attempted
5 to force this Court to rule on the argument made and supported by the false swearing. Plaintiff
6 has written two letters on the matter attempting to resolve the issue but so far no correction has
7 been made. Exhibit E and F In addition the issue has been clearly brought to the attention of
8 both attorneys during phone discussions. As is clear by the responsive letter no corrections is
9 being made.

10 Accordingly, Defendants should in the alternative: a) have their pleadings stricken and
11 default awarded to Plaintiff on all of his claims against Defendants with costs and fees; or, b)
12 have monetary sanctions awarded against Defendants and their attorney for false swearing as
13 indicated herein.

14 **POINTS AND AUTHORITIES**

15 *ORCP 17 Sanctions*

16 ORCP 17 provides for monetary sanctions for false swearing against a party or an attorney
17 responsible for false swearing. ORCP 17 (D). An attorney by rule automatically warrants four
18 certifications to the court when they sign a pleading, motion or other paper:

- 19 1) A party or attorney certifies that the pleading, motion or other document is not
20 being presented for any improper purpose, such as to harass or to cause
unnecessary delay or needless increase in the cost of litigation.
- 21 2) An attorney certifies that the claims, defenses, and other legal positions taken in
22 the pleading, motion or other document are warranted by existing law or by a non
frivolous argument for the extension, modification or reversal of existing law or
the establishment of new law.

- 1 3) *A party or attorney certifies that the allegations and other factual assertions in*
2 *the pleading, motion or other document are supported by evidence. Any*
3 *allegation or other factual assertion that the party or attorney does not wish to*
4 *certify to be supported by evidence must be specifically identified. The attorney*
5 *or party certifies that the attorney or party reasonably believes that an allegation*
6 *or other factual assertion so identified will be supported by evidence after further*
7 *investigation and discovery.*
- 8 4) The party or attorney certifies that any denials of factual assertion are supported
9 by evidence. Any denial of factual assertion that the party or attorney does not
10 wish to certify to be supported by evidence must be specifically identified. The
11 attorney or party certifies that the attorney or party believes that a denial of a
12 factual assertion so identified is reasonably based on a lack of information or
13 belief. (Emphasis Supplied).

14 ORCP 17 (C)(2)-(5). As highlighted above, one such certification made is that the document
15 filed is supported by evidence.

16 To further explain, where the court finds that an ambiguity was carefully crafted to
17 mislead the court, the drafter of the ambiguity was still subject to ORCP 17 sanctions,
18 notwithstanding the literal truth of the words used in the statement. Sinio v. Bledsoe, 172 Or
19 App 254, 18 P.3d 410 (Or App 2001). The court must first determine what the intended
20 ambiguous statement was intended to convey. Id. The court may then determine whether
21 evidence supports the statement's intended message. Id. In short, the inquiry is: "whether the
22 person making the allegation or assertion reasonably believed that there either was or would be
some evidence to support the assertion. Id.

1 In this case, Defendant Sides made a representation about the nature and extent of his
2 contractual obligations in order to defeat Plaintiff's Motion for Partial Summary judgment,
3 namely, that Defendants could not move certain residential structures from one location to
4 another, despite being "ready, willing and able" because Plaintiff had not completed the
5 preparation of the lots. (See Sides Declaration paragraph 6). In fact Defendant opted out of the

1 obligation to move the homes and chose alternatively to purchase three lots belonging to Plaintiff
2 located at "Evergreen" for the price of \$35,000.00 each. Having exercised the purchase option,
3 Defendant had no obligation to move the homes as indicated in his sworn declaration. Also,
4 having exercised the option, Defendant had 6 months from April 28, 2010 or October 28, 2010,
5 to consummate the transaction, an obligation he failed to perform. (See Transcript Marked as
6 Exhibit C - Reply 1) Defendant's sworn statement is refuted by all available evidence, thus
7 Defendant has made a false declaration and his attorneys have made a false certification under
8 ORCP 17 (C). See ORCP 17(D)(1).

9 Moreover, and in addition to the inconsistencies highlighted above, Defendant Sides, by
10 and through his attorney Ray Reid, has added yet another version of events regarding the
11 "Evergreen" property, by asserting that at one time Sides was to purchase the lots, but after
12 hearing Plaintiff's testimony as set forth in Exhibit D that Sides now prefers to move houses onto
13 the lots. (See Letter from Reid, marked as Exhibit "B" and Exhibit "D"). Upon examination of
14 the testimony of both parties regarding the "Evergreen" lots, it was clear that Sides *already* had
15 previous knowledge of the status of the physical characteristics of the "Evergreen" property,
16 including the absence of readily available utility hookups, when he testified that he elected to
17 purchase the lots in lieu of moving houses onto the property. (See Exhibit C - Reply 1).
18 Furthermore, this additional position seems to be removed from the reality that having elected to
19 purchase the properties, Defendant Sides is now contractually obligated to do so, and has no
20 unilateral right to modify that contractual obligation.

21 Absent a showing upon clear and convincing evidence of wanton misconduct, the
22 sanction must be limited to amounts sufficient to reimburse the moving party for attorney fees

1 and other expenses incurred by reason of the false certification. ORCP 17(D)(4). However,
2 upon such a showing of wanton misconduct, the court may impose sanctions in an amount
3 sufficient to deter future false certification. Id.

4 In this case, as the evidence above clearly and convincingly demonstrated a reckless
5 indifference for the authority of the court the Defendants and their attorney support an
6 additional award of monetary sanctions in an amount to be determined through ORCP 68, but
7 estimated at \$5,000.00. Plaintiff seeks as an amount sufficient to deter future false swearing of
8 five times the amount of fees expended in responding to the motion reply containing the false
9 swearing.

10 *Bad Faith Misrepresentation Supports Entry of Default Under Inherent Power of the Court*

11 Inherent power sanctions may be imposed upon a party, (See Alyeska Pipeline Serv. v.
12 Wilderness Society, 421 US 240, 258-259, 95 S.Ct. 1612 (1975)); and counsel in litigation
13 (Roadway Express, Ind. v. Piper, 447 US 752, 766, 100 S.Ct. 2455 (1980). However, the actions
14 of counsel, without an independent showing of bad faith which may be demonstrated by
15 knowledge of, participation in, or acquiescence to, may not support the imposition of inherent
16 power sanctions against a party. Bonilla v. Volvo Car Corp., 150 F.3d 88 (1st Cir. 1998).¹

17 In this instance, because of counsel's actions, the court should subject counsel to the
18 inherent powers of this court to ensure its own orders, processes, and judgments are followed,
19 and further to award sanctions to ensure that Defendants may not "be allowed to determine for
20 itself which laws it will choose to obey and which laws it will choose not to follow; or which
21
22

1 duties it will faithfully perform and which it will simply interpret away.” Oregonians for Sound
2 Economic Policy v. SAIF, 218 Or App 31, 37, 178 P.3d 286 (Or App 2008).

3 A prerequisite to exercising the inherent power of the court to sanction a party to the
4 proceeding is a showing of bad faith. Roadway Express, Inc. v. Piper, 447 US 752, 765-766, 100
5 S.Ct. 2455 (1980). Bad faith may be inferred from any set of facts that reasonably suggest it.
6 Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987).

7 In this case, Defendant through counsel have manufactured testimony for the court to rule
8 on in deciding his Motion for Summary Judgment. Defendant’s manufactured testimony is an
9 abusive litigation practice that has often supported an award of dismissal or entry of default.

10 To illustrate, fabricating documentary evidence or testimony is a bad faith, abusive
11 practice that is subject to inherent power sanctions. Pope v. Federal Express Corp., 974 F.2d
12 982, 984 (8th Cir. 1992) (dismissal of lawsuit within inherent power of court where
13 “manufactured evidence and perjured testimony” introduced); Pope v. Federal Express Corp., 138
14 F.R.D. 675, 683 (W.D. Mo. 1990) (Manufacturing documentary exhibits constitutes “an attempt
15 to perpetrate a fraud on the court” and is sanctionable under the inherent power); Vargas v. Peltz,
16 1995 US Dist. LEXIS 14574, at *31 (S.D. Fla. Mar. 17 1995) (“Fabrication of evidence, perjury
17 and obstruction of the discovery process covers the ‘full range of litigation abuses’ and warrants
18 dismissal of the present action”); Cerruti, 1881 S.A. v. Cerruti, Inc., 169 F.R.D. 573, 582-584
19 (S.D.N.Y. 1996) (default judgment, costs and attorneys’ fees imposed against party that
20 fabricated records and failed to withdraw them until the falsity had been detected).

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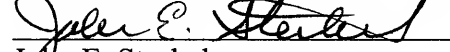
1 The court should respond accordingly, and issue sanctions striking Defendants'
2 pleadings, and entering a default judgment in favor of Plaintiff on his claims against Defendants
3 along with his attorney fees and costs to be determined under ORCP 68.

4 **CONCLUSION**

5 For the foregoing reasons, the court should issue an order imposing monetary sanctions
6 against Defendants and their attorney, and strike Defendants pleadings and enter a default against
7 Defendants and in favor of Plaintiff Yarbrough including Plaintiff's reasonable attorney fees,
8 costs and disbursements.

9 DATED: December 2, 2011.

10 RESPECTFULLY SUBMITTED:

11 
12 John E. Storkel
13 Attorney for Plaintiff
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Case No. 11 C 19158

Plaintiff,

ORDER

v.

ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company, and MANAGEMENT
GROUP OF OREGON, an Oregon Corporation,
And CHARLES SIDES, an individual,

Defendants.

After hearing the evidence and testimony in this matter the Court hereby orders that the plaintiff's are authorized to instruct and order that tenant Leslie Hunter whose mailing address is 776 West Valley View Road, Ashland, Oregon 97520 to make her \$300.00 lease payment directly to Jack Yarbrough by mailing said payment to Jack Yarbrough in care of Attorney, John E. Storkel whose address is 1415 Liberty Street SE, Salem, Oregon 97302 and plaintiff's are also authorized to instruct and order that tenant, Josh Parker whose mailing address is 1100 West Valley View Road, Ashland, Oregon 97520 to make the \$1,000.00 lease payment directly to Jack Yarbrough by mailing said payment to Jack Yarbrough in care of Attorney, John E. Storkel whose address is 1415 Liberty Street SE, Salem, Oregon 97302.

////

*RECEIVED BY PLAINTIFF SHALL BE
CREATED AGAINST AMOUNTS
DUE*

1 Defendant's are further directed to deliver at their expense the steel building listed in
2 paragraph 4 of the loan agreement including all parts, components, accessories, blue prints,
3 plans, and/or diagrams necessary to erect the building and make it into a working functional
4 building to a specific site on the Lender's property located behind the Pilot/McCoy Freightliner
5 in Brooks, Oregon on or before December 20, 2011.

V. Day

6 The court further awards attorney fees to the plaintiff in an amount to be submitted and
7 determined subsequent to the Motion for Partial Summary Judgment hearing in this matter.

8 DATED: December 12, 2011

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11 _____
12 CIRCUIT COURT JUDGE
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STATE OF OREGON
Marion County Circuit Courts

JAN 13 2012

ENTERED

STATE OF OREGON
Marion County Circuit Courts

JAN 09 2012

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, An Oregon
Limited Liability Company; and MANAGEMENT
GROUP OREGON, INC., an Oregon Corporation;
And CHARLES SIDES, an Individual; and
BANK OF THE WEST, a California Chartered
Commercial Bank,

Defendants.

Case No. 11C 19158

FIRST AMENDED COMPLAINT

JUDICIAL FORECLOSURE OF
TRUST DEED; MONEY DAMAGES;
SPECIFIC PERFORMANCE; AND
SUIT UPON PERSONAL
GUARANTEE

Claims between \$150,000.00-
\$499,000.00

(NOT Subject to Mandatory Arbitration)

Plaintiff alleges as follows:

FACTS COMMON TO ALL CAUSES OF ACTION

1.

Jack R. Yarbrough (hereinafter "Yarbrough") was at all material times herein a resident
of the City of Keizer, State of Oregon.

2.

Defendant Aspen Pacific City, LLC (hereinafter "Aspen"), is a Limited Liability
Company, organized and existing under the laws of the State of Oregon with a principal place of
business in Marion County, Oregon.

1
2 3.

3 Defendant Management Group Oregon, Inc. (hereinafter "Management Group"), is an
4 Oregon corporation, organized and existing under the laws of the State of Oregon with a
5 principal place of business in Marion County, Oregon.

6 4.

7 Defendant Charles Sides, (hereinafter "Sides") was at all times herein mentioned, and
8 now is a resident of Marion County, Oregon. All acts and conduct attributable to Sides in this
9 Complaint were undertaken within the course and scope of his association and employment with
10 the Corporations mentioned herein, were sanctioned, ratified, or adopted by the Corporations as
11 part of Sides' actual, apparent, or implied authority.

12 5.

13 Defendant Bank of the West is a California chartered commercial bank licensed and
14 authorized to conduct banking business in the State of Oregon.

15 6.

16 On or about April 28, 2010, (hereinafter the "April 2010 Loan") Defendants Aspen and
17 Sides, for value received, made and executed their promissory note in the amount of \$350,000.00
18 payable to Plaintiff Yarbrough according to the terms and provisions of the promissory note. On
19 about April 28, 2010, said Defendants entered into a Loan Agreement with Yarbrough for the
20 sum of \$350,000.00. Said financial obligations are secured by a Deed of Trust upon certain real
21 property executed as part of the loan transaction. (All three documents are collectively referred
22 to herein as "The April Loan Documents" and are attached as Exhibits "A," "B," and "C").

1 7.

2 On or about April 28, 2010, Defendant Sides Personally Guaranteed to Yarbrough all
3 obligations of Aspen under the April loan documents including the promissory note set forth
4 hereinabove.

5 8.

6 On or about January 25, 2011, (hereinafter the "January Loan") Defendants
7 Management Group and Sides, for value received, made and executed a loan agreement and note
8 in the amount of \$185,000.00 payable to Plaintiff Yarbrough according to the terms and
9 provisions of the documents. In lieu of a Loan Fee, said Defendants agreed and did convey to
10 Yarbrough certain unconstructed parts and materials comprising a 300' by 80' steel commercial
11 building valued at not less than \$25,000.00. The ongoing financial obligations are secured by a
12 UCC Financing Statement upon certain income executed as part of the loan transaction. (all
13 documents are collectively referred to herein as "The January Loan Documents" and are attached
14 as Exhibits "D, "E," and "F").

15 9.

16 On or about January 25, 2011, Defendant Sides Personally Guaranteed to Yarbrough all
17 obligations of Management Group under the January loan documents set forth hereinabove.

18 10.

19 Plaintiffs have performed all conditions, covenants and promises under the April loan
20 agreements. All amounts under the April note and loan documents became immediately due and
21 payable on April 26, 2011.

1
2 11.

3 Delinquent installments and other amounts under the January note and loan documents
4 are due immediately. Defendants have failed and refused to deliver the steel building pledged to
5 Yarbrough in lieu of loan fees.

6 12.

7 The notes and other loan documents set forth hereinabove, including the deed of trust,
8 provide that Plaintiff is entitled to recover reasonable attorney fees and all reasonable costs and
9 expenses incurred in enforcing the notes and foreclosing the security. There are no other
10 proceedings for the collection of these debt or a foreclosure of the deed of trust.

11
12 **FIRST CAUSE OF ACTION**

(Foreclosure of Real Property pursuant to the April Loan)

13 For his First Cause of Action, Plaintiff alleges:

14 13.

15 Plaintiff re-alleges paragraphs 1 through 12.

16 14.

17 The interests of Defendants are inferior to the interests of the trust deed referenced in
18 paragraph 5. Plaintiff is entitled to a judgment of foreclosure that Plaintiff's lien is valid lien on
19 the property and foreclosing all interest of the Defendants in the subject real property.

20 ///

21 ///

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15.

Plaintiff re-alleges paragraphs 1 through 11.

SECOND CAUSE OF ACTION
(Count Two Pursuant to the January Loan-Specific Performance)

For Count Two of the Second Cause of Action, Plaintiff alleges:

17.

Plaintiff re-alleges paragraphs 1 through 16.

18.

Although demand has been made on the Defendants to fully consummate the transaction by the delivery of the commercial steel building, as provided in the agreements, Defendants have failed and refused, and still fail and refuse to perform as required.

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21.

22.

23.

JOHN E. STORKEL
1415 LIBERTY STREET SE
SALEM, OREGON 97302
(503) 363 6625

1 Yarbrough and has stated that it will not voluntarily consent to the building components being
2 taken into possession by Yarbrough.

3 24.

4 This is a proceeding for declaratory relief under ORS Chapter 28 for the purpose of
5 determining a question of actual controversy and the rights, status and legal relationship between
6 the parties hereto. Plaintiff is without an adequate remedy, either at law or in equity. The relief
7 sought for herein will determine the present uncertainty and controversy.

8 WHEREFORE, Plaintiff prays for an order of this court, awarding:

9 A. UPON THE CAUSE OF ACTION ON THE APRIL LOAN:

- 10 1. That Plaintiff have a judgment against Defendants for the principal sum of
11 \$350,000.00, plus accrued interest and assessments until paid, plus reasonable
12 attorney fees, the further sum of \$200.00 for foreclosure title report to search records,
13 and for Plaintiff's costs and disbursements incurred herein;
- 14 2. That Plaintiff's real property trust deed set forth in the first cause of suit be declared a
15 valid and existing lien upon the subject real property for the amount of the judgment
16 prayed for in said cause of suit;
- 17 3. Declaring the interest of the Defendants to be inferior to the lien of Plaintiff;
- 18 4. That Plaintiff's trust deed upon the subject real property be foreclosed; that the title,
19 claim, interest or demand of Defendants in said property, and every part thereof,
20 saving and excepting the right of redemption, if any, be foreclosed;
- 21 5. That the above described real property with all its appurtenances, rights, privileges
22 and easements shall be sold by the Sheriff on execution after giving notice required
by law; that any party to this suit may be a purchaser at said sale; and that said
purchaser be let into the immediate possession of said real property and every part
thereof; that said Sheriff give to any such purchaser of the real property a Certificate
of Sale and after the time allowed for redemption of said real property, unless said
real property be redeemed, a deed;
6. That the proceeds of said sale be applied as follows:
 - a. First, to pay costs and expenses of sale;
 - b. Second, to pay the judgment of plaintiff on its cause of suit;
 - c. Third, any overplus to be paid to the Clerk of this Court, subject to the further
order of this Court;
7. For such other and further relief as this Court deems just and proper.

1 B. UPON COUNT ONE OF THE CAUSE OF ACTION ON THE JANUARY LOAN:

- 2 1. That Plaintiff have a judgment against Defendants for the principal sum of
3 \$9,000.00 to date, plus accrued interest and assessments until paid;
4 2. For costs and disbursements;
3. For attorney fees in an amount to be determined pursuant to ORS 68;
4. For such other and further relief as the court may deem proper.

5 C. UPON COUNT TWO OF THE CAUSE OF ACTION ON THE JANUARY LOAN

- 6 1. For a decree of specific performance and order of delivery of the Steel Building
7 hereinabove described;
8 2. For costs and disbursements;
3. For attorney fees in an amount to be determined pursuant to ORS 68;
4. For such other and further relief as the court may deem proper.

9 D. UPON THE CAUSE OF ACTION ON THE PERSONAL GUARANTEES:

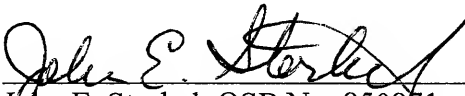
- 10 1. For the sum of \$384,000.00, with interest and assessments thereon from the
11 respective maturity and default dates;
12 2. For costs and disbursements;
3. For attorney fees in an amount to be determined pursuant to ORS 68;
4. For such other and further relief as the court may deem proper.

13 E.) UPON THE CLAIM FOR DECLARATORY RELIEF:

- 14 1. That the Court enter a judgment declaring and adjudicating the respective rights
15 of Plaintiff and Defendant.
16 2. For Plaintiff's costs and disbursements incurred herein; and
3. For such other and further relief as this Court deems just and proper.

17 DATED this 9th day of January, 2012.

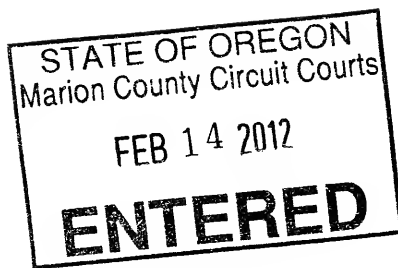
18 Respectfully Submitted,

19 
20 John E. Storkel, OSB No. 850871
21 Attorney for Plaintiff
22

STATE OF OREGON
MARION COUNTY COURTS

FEB 10 2012

FILED



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, an Oregon
Limited Liability Company; and
MANAGEMENT GROUP OREGON, INC.,
an Oregon Corporation; And Charles Sides, an
Individual; and BANK OF THE WEST, a
California Chartered Commercial Bank,

Defendants.

) Case No. 11C19158

)

) **ANSWER, AFFIRMATIVE DEFENSES,**
) **AND COUNTERCLAIMS OF**
) **DEFENDANT BANK OF THE WEST TO**
) **PLAINTIFF'S FIRST AMENDED**
) **COMPLAINT**

)

) **Filing Fee: \$505.00**

) **Fee Authority: ORS 21.160(1)(c)**

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ANSWER

Defendant Bank of the West ("BOTW") hereby answers Plaintiff's First Amended
Complaint as follows:

1.

BOTW lacks sufficient information to admit or deny the allegation in paragraph 1 and
therefore denies it.

2.

BOTW admits the allegations in paragraph 2.

3.

BOTW admits the allegations in paragraph 3.

////

1 4.

2 BOTW admits the allegations in the first sentence of paragraph 4. BOTW lacks
3 knowledge or information sufficient to admit or deny the allegations in the second sentence in
4 paragraph 4 and, therefore, denies them.

5 5.

6 BOTW admits it is a bank chartered in the State of California and authorized to do
7 business in the State of Oregon.

8 6.

9 BOTW lacks knowledge or information sufficient to form a belief as to the truth of the
10 allegations in paragraph 6 and, therefore, denies them.

11 7.

12 BOTW lacks knowledge or information sufficient to form a belief as to the truth of the
13 allegations in paragraph 7 and, therefore, denies them.

14 8.

15 BOTW denies Defendants Management Group Oregon, Inc. (“**MGO**”) and Charles Sides
16 (“**Sides**”) have or had any right to agree to or to convey to Plaintiff “certain unconstructed parts
17 and materials comprising a 300’ by 80’ steel commercial building” (the “**steel building parts**”)
18 or that, if they had the right to agree or convey the steel building parts to Plaintiff, that they did,
19 in fact, convey the steel building parts to Plaintiff. BOTW admits any UCC Financing Statement
20 perfected by Plaintiff does not describe the steel building parts. BOTW is without knowledge or
21 information sufficient to form a belief as to the truth of the remainder of the allegations in
22 paragraph 8 and, therefore, denies them.

23 9.

24 BOTW lacks knowledge or information sufficient to form a belief as to the truth of the
25 allegation in paragraph 9 and, therefore, denies it.

10.

BOTW is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and, therefore, denies them.

11.

BOTW admits it has failed and refused to deliver the steel building parts to Plaintiff. BOTW is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in paragraph 11 and, therefore, denies them.

12.

BOTW denies it is liable for any attorney fees. BOTW is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 and, therefore, denies them.

13.

BOTW admits and denies paragraphs 1 through 12 as explained above.

14.

BOTW denies its interests in personal property are inferior to Plaintiff's and denies Plaintiff is entitled to a judgment foreclosing personal property. BOTW admits it has no right, title or interest in the real property described in the trust deed described in paragraph 6 of Plaintiff's First Amended Complaint and attached thereto as Exhibit C.

15.

BOTW admits and denies paragraphs 1 through 11 as set forth above.

16.

BOTW denies it is a party to any agreement with Plaintiff. BOTW denies the allegations in paragraph 16.

17.

BOTW admits and denies paragraphs 1 through 16 as set forth above.

1 18.
2 BOTW denies it is a party to any transaction with Plaintiff and that it has any obligation
3 to perform anything with respect to Plaintiff; therefore, BOTW denies the allegations in
4 paragraph 18.

5 19.
6 BOTW admits and denies paragraphs 1 through 18 as set forth above.

7 20.
8 BOTW is without knowledge or information sufficient to form a belief as to the truth of
9 the allegations in paragraph 20 and, therefore, denies them.

10 21.
11 BOTW admits and denies paragraphs 1 through 12 as set forth above.

12 22.
13 BOTW denies Plaintiff has any right, title, or interest in the steel building or that BOTW
14 has any contractual obligation of any kind to Plaintiff; therefore, BOTW denies the allegations in
15 paragraph 22.

16 23.
17 BOTW admits it has a priority security interest in the steel building parts and the real
18 property where the steel building parts are located. Furthermore, BOTW admits it will not
19 consent to Plaintiff gaining access to BOTW's real property collateral to take possession of
20 BOTW's personal property collateral.

21 24.
22 BOTW denies Plaintiff has any right, title, or interest in the steel building parts or that a
23 legal relationship exists between Plaintiff and BOTW. BOTW denies there is uncertainty or
24 controversy regarding its possession or priority interest in the steel building parts based on its
25 actual possession and its prior perfected interest in the steel building parts. BOTW denies

1 Plaintiff is without an adequate remedy against the other Defendants and that this is a proceeding
2 for declaratory relief under ORS Chapter 28.

3 By way of Affirmative Defenses, Defendants allege as follows:

4 **FIRST AFFIRMATIVE DEFENSE**

5 (Failure to State a Claim)

6 25.

7 Plaintiff's First Amended Complaint fails to state a claim against BOTW upon which
8 relief may be granted.

9 **SECOND AFFIRMATIVE DEFENSE**

10 (Failure to Name a Necessary Party)

11 26.

12 Plaintiff's First Amended Complaint fails to name the party in actual possession of the
13 steel building parts and the party who granted to BOTW a priority interest in the steel building
14 parts.

15 **THIRD AFFIRMATIVE DEFENSE**

16 (Conflicting Legal Proceeding)

17 27.

18 On about August 11, 2011, BOTW commenced a case in Marion County, Case No.
19 11C19592, for, *inter alia*, a determination of its right, priority, and entitlement to the assets of
20 Mid-Valley Forest Products LLC ("Mid-Valley"); Butte Development Company ("Butte"); and
21 Shaniko Forest Products, Inc. ("Shaniko"), including the steel building parts.

22 ////

23 ////

24 ////

25 ////

1 Plaintiff alleges the following Counterclaims against Plaintiff:

2 **FIRST COUNTERCLAIM**

3 (Priority)

4 28.

5 Mid-Valley is obligated to BOTW under a Credit Agreement and a separate Bridge Loan
6 Note as follows:

7 A. **Obligation #0034**. The principal sum of \$2,250,000.00, together with interest accrued
8 through July 26, 2011, in the amount of \$58,861.93, is now due and owing; interest accrues at a
9 variable rate, currently in the amount of \$167.84688 per day.

10 B. **Obligation #0042**. The principal sum of \$2,250,000.00, together with interest accrued
11 through July 26, 2011, in the amount of \$58,861.93, is now due and owing; interest accrues at a
12 variable rate, currently in the amount of \$167.84688 per day.

13 C. **Obligation #0059**. The principal sum of \$5,443,959.84, together with interest accrued
14 through July 26, 2011, in the amount of \$142,418.67, is now due and owing; interest accrues at a
15 variable rate, currently in the amount of \$406.11184 per day.

16 D. **Obligation #0067**. The principal sum of \$1,604,091.73, together with interest accrued
17 through July 26, 2011, in the amount of \$41,964.42, is now due and owing; interest accrues at a
18 variable rate, currently in the amount of \$119.66302 per day.

19 E. **Obligation #0174**. The principal sum of \$650,000.00, together with interest accrued
20 through July 26, 2011, in the amount of \$31,108.34, is now due and owing; interest accrues at a
21 variable rate, currently in the amount of \$93.62799 per day.

22 29.

23 To secure the obligations of Mid-Valley under the Credit Agreement and the Bridge Loan
24 Note, Mid-Valley, Butte, and Shaniko executed respective Security Agreements wherein each of
25

1 them granted to BOTW an interest in, *inter alia*, all their respective inventory, equipment,
2 money, accounts, documents, and assets.

3 30.

4 BOTW perfected its interest in the assets of Mid-Valley, Butte, and Shaniko on May 22,
5 2008, by recording the following respective UCC-1 Financing Statements: a) File Number
6 7975967; b) File Number 7975945; and File Number 8069779; wherein BOTW described the
7 assets of Mid-Valley, Butte, and Shaniko, respectively.

8 31.

9 As security for Mid-Valley's obligations to BOTW, Mid-Valley executed and delivered
10 to Plaintiff a Trust Deed in real property located in Yamhill County and commonly described as
11 40919 16th Street, Lyons, Linn County, Oregon. The Trust Deed was duly acknowledged and
12 recorded on May 19, 2008, under Instrument No. 2008-08642, records of Yamhill County,
13 Oregon. As part of the action commenced by BOTW in Marion County, Case No. 11C19592,
14 BOTW seeks to foreclose all interests in the real property; however, Mid-Valley is presently in
15 possession of the real property.

16 32.

17 BOTW reasonably believes, and therefore alleges, the steel building parts were located
18 on the real property described in paragraph 31 when BOTW perfected its interest in the real
19 property and all of the personal property assets of Mid-Valley, Butte, and Shaniko, and when
20 BOTW valued appraised the value of its collateral, and the steel building parts have remained on
21 the real property collateral of BOTW at all times.

22 33.

23 Neither Plaintiff, nor his alleged promisor, had/have any any interest of record in, or
24 physical or constructive possession of, the steel building parts.

1 34.

2 Plaintiff does not have any right, title, or interest in the steel building parts.

3 **SECOND COUNTERCLAIM**

4 (Trespass to Chattels)

5 35.

6 BOTW realleges the allegations in paragraphs 27 through 34 as if fully restated herein.

7 36.

8 Plaintiff's actions with respect to the steel building parts are, in fact, inconsistent with the
9 right of BOTW to control and possess its collateral and Plaintiff's threats and claims to monetary
10 damages have prevented BOTW from exercising its legitimate rights of dominion and control of
11 the steel building parts.

12 37.

13 Plaintiff's actions have constructively prevented BOTW's disposition of the steel
14 building through sale or otherwise, and BOTW will be damaged if it is unable, or prevented,
15 from selling or disposing of the steel building parts at the time it sells or disposes of its other
16 personal property collateral and/or real property collateral.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, BOTW prays for judgment against Plaintiff as follows:

19 1. That Plaintiff takes nothing by its First Amended Complaint and that judgment be
20 entered in BOTW's favor; and

21 2. That an Order be entered in favor of BOTW on its Counterclaim declaring its interest
22 in certain personal property, including the steel building and its components alleged in Plaintiff's
23 First Amended Complaint, has priority and is superior to any alleged interest of Plaintiff and the
24 other Defendants; and

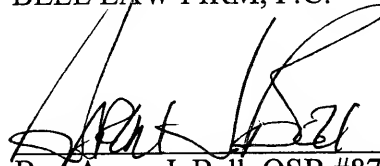
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1 3. For an award of BOTW damages proven at the time of trial for Plaintiff's trespass to
2 the collateral of BOTW; and

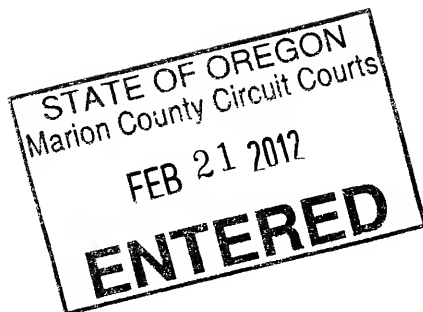
3 4. For such other and further relief as the Court deems just and proper.
4

5 Dated this 9th day of February, 2012.
6

7 BELL LAW FIRM, P.C.

8
9 

10 By: Aaron J. Bell, OSB #871649
11 Of Attorneys for Bank of the West
12 aaron@belllawfirmpc.com
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC an Oregon
Limited Liability Company; and
MANAGEMENT GROUP OREGON,
INC. an Oregon corporation; and CHARLES
SIDES, an individual; and BANK OF THE
WEST, a California Chartered Commercial
Bank,

Defendants.

Case No. 11C19158

**DEFENDANTS' ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S AMENDED
COMPLAINT**

Defendants Aspen Pacific City, LLC ("Aspen"), Management Group Oregon,
Inc., ("Management") and Charles Sides ("Sides") respond to Plaintiff's Amended
Complaint as follows:

1.

Admits Paragraph 1, 2 and 3.

2.

In response to Paragraph 4, admits that Defendants Sides is a resident of Marion
County, Oregon, and further admits that some of the actions taken by Sides were as agent

1 for Defendants Aspen and Management. Except as expressly submitted herein,
2 Defendants deny the remainder of the allegations in Paragraph 4.

3 3.

4 The allegations of Paragraph 5 are not directed at Defendants Aspen,
5 Management or Sides, and therefore no answer is required. To the extent an answer is
6 required, Defendants deny the allegations.

7 4.

8 Admit Paragraphs 6 and 7.

9 5.

10 Admit Paragraphs 8 and 9.

11 6.

12 Defendants deny Paragraph 10.

13 7.

14 Defendants deny that there is anything left due and owing to Plaintiff on account
15 of this loan. Defendants further allege that Plaintiff has failed to clear the location for
16 delivery of the steel building and Defendants stand ready, willing and able to deliver the
17 steel building as soon as the location is cleared.

18 8.

19 Admit that the Notes and other loan documents provide that the prevailing party is
20 entitled to recover reasonable attorney fees and all reasonable costs and expenses.
21 Defendants deny that Plaintiff is entitled to an award of attorney fees and allege that
22 Defendants are entitled to an award of their attorney fees as the prevailing party.

23 9.

1 In response to Paragraph 13, Defendants reallege their admissions and denials as
2 set forth above and below.

3 10.

4 In response to Paragraph 14, Defendants deny the paragraph in its entirety.

5 11.

6 In response to Paragraph 15, Defendants reallege their admissions and denials as
7 set forth above and below.

8 12.

9 Defendants deny Paragraph 16. Defendants further allege that said loan has been
10 paid in full.

11 13.

12 In response to Paragraph 17, Defendants reallege their admissions and denials as
13 set forth above and below.

14 14.

15 In response to Paragraph 18, Defendants admit that the building has not been
16 delivered, but deny that the site for the building is ready for placement of the building as
17 set forth in Paragraph 7 above.

18 15.

19 In response to Paragraph 19, Defendants reallege their admissions and denials as
20 set forth above and below.

21 16.

22 In response to Paragraph 20, admit that Defendant Sides personally guaranteed all
23 obligations, but deny that anything is owed on account of the January loans and further
24 alleges that the April loan was current and that all monthly installments were paid at the

1 time this action was filed. Plaintiff's filing this action represents a breach of the parties'
2 agreement and excuses Defendants' performance.

3 17.

4 Paragraphs 21 through 24 contain allegations not directed at Defendants Aspen,
5 Management or Sides, and therefore Defendants Aspen, Management and Sides do not
6 respond to the allegations. To the extent a response is required, Defendants Aspen,
7 Management and Sides deny the allegations.

8 FOR A FIRST AFFIRMATIVE DEFENSE, Defendants allege as follows:

9 **(FAILURE TO STATE A CLAIM)**

10 18.

11 The allegations contained in Plaintiff's Amended Complaint fail to allege ultimate
12 facts sufficient to constitute a claim for relief on the April loan agreement.

13 FOR A SECOND AFFIRMATIVE DEFENSE, Defendants allege as follows:

14 **(WAIVER)**

15 19.

16 Plaintiff's claims are barred by the doctrine of waiver. Defendants further allege
17 that Plaintiff was waived the time of the essence clause in the loan documents.

18 FOR A THIRD AFFIRMATIVE DEFENSE, Defendants allege as follows:

19 **(RESERVATION OF RIGHTS)**

20 20.

21 Defendants reserve the right to allege further affirmative defenses as discovery
22 continues.

23 WHEREFORE, Defendants pray for a Judgment from this Court as follows:

24

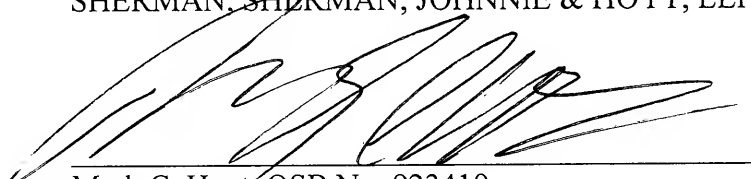
SHERMAN, SHERMAN, JOHNNIE, & HOYT, LLP
693 Chemeketa Street NE / Post Office Box 2247
Salem, Oregon 97308-2247
(503)364-2281 FAX: (503)370-4308

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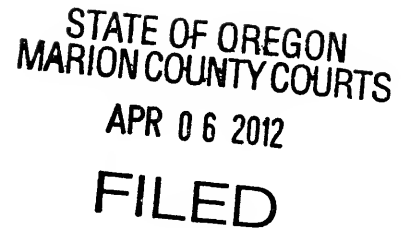
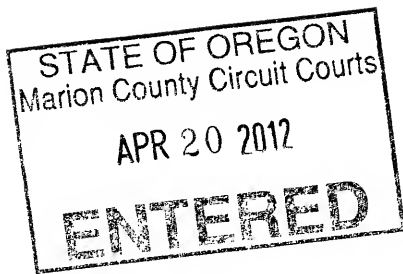
1. Awarding Defendants their reasonable attorney fees and costs and disbursements incurred herein pursuant to the loan documents.
2. For a dismissal of all claims against Defendants with prejudice.
3. For such other relief as the court deems just and equitable.

DATED this 16th day of February, 2012.

SHERMAN, SHERMAN, JOHNNIE & HOYT, LLP



Mark C. Hoyt, OSB No. 923419
Of Attorneys for Defendants



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, an Oregon
Limited Liability Company; and
MANAGEMENT GROUP OREGON, INC., an
Oregon Corporation; And Charles Sides, an
Individual; and BANK OF THE WEST, a
California Chartered Commercial Bank;

Defendants.

Case No. 11C19158

Honorable Vance Day

**DEFENDANT BANK OF THE WEST'S
MOTION FOR SUMMARY
JUDGMENT**

Statutory Requirement: ORS 21.200(1)(a)
Filing Fee: \$100.00

ORAL ARGUMENT REQUESTED INFORMATION

- | | |
|--|------------|
| 1. Estimated time for oral argument | 20 minutes |
| 2. Official court reporting services requested | No |
| 3. Oral argument requested by telephone | No |

I. INTRODUCTION

Defendant Bank of the West ("**BOTW**") moves this Court for summary judgment with respect to BOTW's counterclaims regarding the priority of its interest in a steel building and the trespass of Plaintiff to BOTW's interest in the steel building on the ground and for the reason that there are no disputed issues of fact and BOTW is entitled to judgment as a matter of law. In support of this Motion BOTW relies on the records and files herein, ORCP 47, the Affidavit of Christiana Creekpaum ("**Creekpaum Affidavit**"), the Affidavit of Rhonda Meisenburg ("**Meisenburg Affidavit**") and the points and authorities cited below.

On May 15, 2008, Butte Development Company ("**Butte**") executed a Security Agreement

1 wherein it granted to BOTW interests in, *inter alia*, all inventory, equipment, money, accounts,
2 documents, and assets. On May 28, 2008, and August 28, 2009, respectively, Mid-Valley Forest
3 Products LLC (“**Mid-Valley**”) executed Security Agreements granting BOTW interests in, *inter*
4 *alia*, all its inventory, equipment, money, accounts, documents, and assets. BOTW then perfected
5 its interest in the collateral described in the Security Agreements by filing respective Financing
6 Statements with the Oregon Secretary of State. Likewise, BOTW perfected its interest in real
7 property located in Linn County and commonly described as 40919 16th Street, Lyons, Linn
8 County, Oregon (the “**Real Property**”).

9 The crux of Plaintiff’s case against Bank of the West is its argument that Management
10 Group Oregon, Inc. (“**MGO**”) and Charles Sides agreed to convey to Plaintiff title to steel building
11 parts. In fact, the agreement provides that “Borrower shall convey title to a steel building” A
12 steel building is not necessarily the steel building parts located on the Real Property. In any event,
13 Plaintiff has not alleged that MGO or Charles Sides have ever owned a steel building or the parts on
14 the Real Property. Plaintiff does not have any indicia of ownership or title to the steel building parts
15 on the Real Property; and Plaintiff does not have a security interest (perfected or otherwise) in the
16 Real Property or the steel building parts on the Real Property. Conversely, it is clear that BOTW
17 perfected its interest in the Real Property and all of the personal property of Butte and Mid-Valley.
18 At all times relevant to this case, the Real Property has been owned by Butte and has been in the
19 possession of Butte and Mid-Valley, and neither MGO nor Charles Sides have had possession of the
20 Real Property since BOTW perfected its interest in the Real Property and all of the personal
21 property of Butte and Mid-Valley. Finally, under the terms of the Security Agreements executed by
22 Mid-Valley and Butte in favor of BOTW, and under the Oregon Uniform Commercial Code,
23 BOTW is entitled to certain remedies including the repossession and sale of its collateral. Plaintiff’s
24 commencement of this action has slandered BOTW’s interest in the steel building parts on the Real
25 Property and will prevent BOTW from exercising its right to sell its collateral.

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1 2. Mid-Valley and Butte are obligated to BOTW in the principal amount of
2 \$12,198,051.57, plus late charges in the amount of \$131,140.52, plus interest to and including
3 March 25, 2012, in the amount of \$571,478.31, plus interest from March 25, 2012, until paid, as
4 follows:

5 a. Obligation #0034. Interest accrues at a variable rate, currently in the amount
6 of \$171.35938 per day;

7 b. Obligation #0042. Interest accrues at a variable rate, currently in the amount
8 of \$171.35938 per day;

9 c. Obligation #0059. Interest accrues at a variable rate, currently in the amount
10 of \$414.61047 per day;

11 d. Obligation #0067. Interest accrues at a variable rate, currently in the amount
12 of \$122.16718 per day;

13 e. Obligation #0174. Interest accrues at a variable rate, currently in the amount
14 of \$94.64271 per day.

15 Creekpaum Affidavit ¶ 2.

16 3. Mid-Valley and Butte executed respective Security Agreements to secure the
17 obligations of Mid-Valley to BOTW, wherein each of them granted BOTW an interest in, *inter*
18 *alia*, all their respective inventory, equipment, money, accounts, documents, and assets.

19 Creekpaum Affidavit ¶ 3.

20 4. BOTW perfected its interests in the assets of Mid-Valley and Butte on May 22,
21 2008, by recording the following respective UCC-1 Financing Statements: a) File Number
22 7975967; and (b) File Number 7975945; wherein BOTW described the assets of Mid-Valley and
23 Butte, respectively. Meisenburg Affidavit ¶ 4.

24 5. As additional security for Mid-Valley's obligations to BOTW, Butte executed and
25 delivered to BOTW a Trust Deed in real property located in Linn County and commonly

1 described as 40919 16th Street, Lyons, Linn County, Oregon (the “**Real Property**”). The Trust
2 Deed was duly acknowledged and recorded on May 19, 2008, under instrument No. 2008-10126,
3 records of Linn County, Oregon. Creekpauam Affidavit ¶ 4; Meisenburg Affidavit ¶ 6. As part of
4 the action commenced by BOTW as Marion County Circuit Court Case No. 11C19592, BOTW
5 seeks to foreclose all interests in the Real Property. Meisenburg Affidavit ¶ 7.

6 **6.** Contrary to Plaintiff’s allegation in paragraph 8 of his First Amended Complaint,
7 MGO and Charles Sides agreed to “convey title to a steel building ...” (emphasis added), not the
8 steel building located on the Real Property. Paragraph 4 of “Exhibit E” to Plaintiff’s First
9 Amended Complaint.

10 **7.** Butte, Mid-Valley, and/or their lessee(s) was/were in possession of the Real
11 Property prior to April 27, 2010 (the date of Plaintiff’s Loan Agreement with Management
12 Group Oregon, Inc. and Charles Sides) and Butte, Mid-Valley, and their lessee(s) have been in
13 possession of the Real Property since that date. Management Group Oregon, Inc. and Charles
14 Sides did not possess the Real Property or personal property on the Real Property on April 27,
15 2010, and they do not presently possess the Real Property or steel building parts on the Real
16 Property. Creekpauam Affidavit ¶ 7.

17 **8.** Prior to Plaintiff’s assertion of a claim to the steel building parts on the Real
18 Property, BOTW had appraised the steel building parts and included that value in its assessment
19 of its collateral and its secured position. Creekpauam Affidavit ¶ 5.

20 **9.** Neither Plaintiff, nor his alleged promisors (Defendants Management Group
21 Oregon, Inc. and Charles Sides), has or had any interest of record in the Real Property of Mid-
22 Valley or Butte. Meisenburg Affidavit ¶ 8.

23 ///

24 ///

25 ///

1 **10.** Plaintiff's action and claim of ownership of the steel building parts on the Real
2 Property prevents BOTW from exercising its rights as a creditor secured by the steel building
3 parts, including conveyance of free and clear title to the steel building parts to a purchaser.
4 Creekpaum Affidavit ¶ 6.

5 **C. BOTW IS ENTITLED TO SUMMARY JUDGMENT ON ITS COUNTERCLAIMS.**

6 **1. There Are No Material Issues of Fact Regarding BOTW's Prior Perfected**
7 **Interest in the Steel Building Parts.**

8 There can only be three issues relating to BOTW's prior perfected interest in the steel
9 building parts on the Real Property: (1) whether BOTW's debtor(s) have an interest in the steel
10 building parts; (2) whether the description of collateral in BOTW's Security Agreement(s) and
11 Financing Statement(s) cover the steel building parts; or (3) whether, notwithstanding the fact
12 BOTW recorded a Financing Statement covering the steel building 2½ years before Plaintiff
13 allegedly acquired an interest, Plaintiff's interest in the steel building is paramount to the interest of
14 BOTW.

15 **Ownership of the Steel Building Parts on the Real Property.**

16 Attachment of a security interest to collateral is a prerequisite to perfection of the interest
17 against the debtor and third parties, and one element of attachment is that the debtor has rights in the
18 collateral or the power to transfer rights in the collateral to a secured party. ORS 79.0203(2)(b). In
19 Oregon, the party who possesses personal property is presumed to be the owner of that personal
20 property. Tracy v. Juanto, 103 Or. 416, 422, 205 P. 822, 824 (1922) ("As men generally own the
21 personal property they possess, proof of possession is presumptive proof of ownership.") *quoting* 1
22 Greenleaf on Evidence §34 (15th Ed.) "[I]f the party not in possession fails to establish superior
23 title to the property, the presumption of ownership based on possession prevails and relieves a court
24 from having to preside over 'a historical goose chase.'" Wilcox v. Stroup, 467 F3d 409, 413 (4th Cir.
25 2006).

1 Plaintiff has only alleged a promise by MGO and Charles Sides to convey title to a steel
2 building; in fact, the Agreement relied upon by Plaintiff does not specify a particular steel building
3 or even refer to the parts on the Real Property. Neither MGO nor Charles Sides held title to the
4 steel building parts on the Real Property and Plaintiff does not allege the existence of any proof of
5 ownership of the steel building parts on the Real Property. Those steel building parts are in the
6 possession of Butte or Mid-Valley and were in the possession of Butte or Mid-Valley at the time
7 MGO and Sides agreed they would convey a steel building to Plaintiff. Butte or Mid-Valley, not
8 MGO or Charles Sides, had the legitimate right to transfer an interest in the particular steel building
9 parts located on the Real Property.

10 **BOTW's Collateral.**

11 Reasonable identification of personal property such that the identity of the collateral is
12 "objectively determinable" is the minimum standard for determining the sufficiency of a
13 description of collateral. ORS 79.0108(2)(f). Identification of collateral by category or type of
14 collateral defined in the Uniform Commercial Code reasonably identifies the collateral. ORS
15 79.0108(2)((b) and (c).

16 The term "Goods" is defined in the Uniform Commercial Code to mean "all things that are
17 movable when a security interest attaches" including fixtures and manufactured structures. ORS
18 79.0102(1)(qq). "Equipment" is defined to mean "goods other than inventory, farm products or
19 consumer goods." ORS 79.0102(1)(gg). "Inventory" is goods, other than farm products, which
20 leased, held for sale or lease, furnished under a contract of service, or materials used or
21 consumed in a business. ORS 79.0102(1)(uu). "Farm Products" are defined to include things
22 grown, raised, or used or produced in a farming operation. ORS 79.0102(1)(hh). "Consumer
23 Goods" are goods used or bought for personal, family or household purposes. ORS
24 79.0102(1)(w).

25 ///

1 Indisputably, the steel building parts on the Real Property are goods other than inventory,
2 farm products or consumer goods. Identification of the steel building parts as “goods” and
3 “equipment” reasonably identifies them as part of BOTW’s collateral.

4 The May 15, 2008 Security Agreement executed by BOTW and Butte contains the following
5 description of “Collateral”:

6 (a) **Equipment.** All goods now owned or hereafter acquired by the Debtor
7 or in which the Debtor now has or may hereafter acquire any interest,
8 including, but not limited to, all machinery, equipment, furniture,
9 furnishings, fixtures, tools, supplies and motor vehicles of every kind and
10 description, and all additions, accessions, improvements, replacements
11 and substitutions thereto and thereof.

12 (b) **Inventory.** All inventory now owned or hereafter acquired by the
13 Debtor including, but not limited to, all raw materials, work in process,
14 finished goods, inventory leased to others or held for lease, merchandise,
15 parts and supplies of every kind and description, including inventory
16 temporarily out of the Debtor’s custody or possession, together with all
17 returns on accounts (the “Inventory”).

18 (f) **Assets.** All assets of the Debtor, whether now existing or hereafter
19 acquired, and the products and proceeds thereof.”

20 The description of Collateral in the Financing Statement filed by BOTW mirrors the description in
21 the Security Agreement. The same description of Collateral is in BOTW’s Security Agreement and
22 Financing Statement relating to Mid-Valley.

23 The description of BOTW’s collateral is comprehensive enough that, at a minimum,
24 Plaintiff would have been on inquiry notice of BOTW’s interest in the steel building parts on the
25 Real Property if he had made a search of liens in the names of the parties who had possession of the
steel building parts. Regardless, as a matter of law the steel building parts are goods and equipment.
Even if they are inventory or fixtures, they are reasonably and sufficiently described in BOTW’s
Security Agreements and Financing Statements.

BOTW’s Rights in the Steel Building Parts are Paramount to any Interest of Plaintiff.

A perfected security interest has priority over a conflicting unperfected security interest.

ORS 79.0322(b). Conflicting perfected interests rank according to the time they were filed or

1 perfected. Perfection of an interest in steel building parts (in a dismantled state, unfixed to real
2 property) requires attachment and a Financing Statement filed with the Oregon Secretary of State.
3 ORS 79.0308 and 79.0310.

4 Unlike Plaintiff, BOTW perfected its security interest in the steel building parts on the Real
5 Property by filing UCC-1 Financing Statements on May 22, 2008. Even if Plaintiff's interest in the
6 steel building parts on the Real Property had attached (Plaintiff had given value to Butte or Mid-
7 Valley and they had executed a Security Agreement with Plaintiff) and Plaintiff had filed a
8 Financing Statement with the Oregon Secretary of State to perfect its interest, the Financing
9 Statement would have been filed after BOTW's interest was perfected. The interest of BOTW in
10 the steel building parts would still be paramount to any interest of Plaintiff.

11 **2. There are No Material Issues of Fact Regarding Plaintiff's Unlawful Trespass**
12 **to BOTW's Chattels.**

13 The elements of trespass to chattels are the same as those for conversion but differ in degree.
14 Scott v. Jackson County, 244 Or.App. 484, 499-500, 260 P.3d 744, 752 (2011) *quoting* Restatement
15 (Second) of Torts § 222A (1965). "In contrast to conversion, in which the interference with the
16 chattel is so great that the actor can justly be required to pay its full value, the gist of the lesser claim
17 of trespass to chattels is the disturbance of the plaintiff's possession." Morrow v. First Interstate
18 Bank of Oregon, N.A., 118 Or.App. 164, 168, 847 P.2d 411, 413 (1993) (citations omitted).

19 Here, Plaintiff holds nothing more than a promise from MGO and Charles Sides that they
20 will convey a steel building to Plaintiff. He does not allege he has a Bill of Sale, a certificate of
21 ownership, or any other indicia of title to the specific building parts that are lying on the Real
22 Property of Butte and in the possession of Butte and Mid-Valley. Plaintiff's ownership claims are
23 entirely inconsistent with BOTW's prior perfected interest in the steel building. Plaintiff cannot, in
24 good faith, claim ownership when: (1) he has no recorded interest; (2) he does not have a possessory
25 interest; (3) BOTW has a prior perfected security interest; and (4) neither BOTW nor the entity in

1 possession of the steel building parts has a legal relationship to or with Plaintiff.

2 This action has interfered with BOTW's right as a secured creditor to exercise its remedies
3 in response to the defaults of its debtors, and Plaintiff's interference is ongoing and will continue
4 until Plaintiff rescinds his claim of ownership. Specifically, this action slanders BOTW's right to
5 conduct a commercially reasonable sale of the steel building parts . Consequently, BOTW is entitled
6 to judgment on its counterclaim of trespass to chattels as a matter of law.

7 III. CONCLUSION

8 BOTW's Motion for Summary Judgment should be granted because there are no disputed
9 issues of material fact and the legal conclusions following from the undisputed facts entitle
10 BOTW to judgment. Specifically, BOTW is entitled to the following:

11 **A. On BOTW's First Counterclaim For Relief**— For an Order declaring that
12 BOTW has a perfected interest in the steel building parts and that Plaintiff does not have an
13 interest in the steel building parts; and

14 **B. On BOTW's Second Counterclaim For Relief**— For judgment establishing the
15 liability of Plaintiff for trespass to BOTW's interest in chattels in amounts to be determined at
16 trial; and

17 **C.** For such other and further relief that this Court deems just and proper.
18

19 **DATED:** April 5, 2012.
20

21 **BELL LAW FIRM, P.C.**

22
23 By: 

24 Aaron J. Bell, OSB #87164
25 Of Attorneys for Bank of the West
aaron@belllawfirmpc.com

SECURITY AGREEMENT

This Security Agreement is made and entered into this May 28, 2008, by and between BANK OF THE WEST (the "Bank") and MID-VALLEY FOREST PRODUCTS LLC (the "Debtor").

1. **Grant of Security Interest.** The Debtor hereby grants to the Bank a security interest in and to all of the following property (hereinafter collectively referred to as the "Collateral"): now owned or hereafter acquired by the Debtor (and any interest of the Debtor now owned or hereafter acquired in such property) and now or any time hereafter located on or at the Real Property (as hereinafter defined) or used in connection therewith, including but not limited to: all goods, machinery, tools, equipment (including fire sprinklers and alarm systems, office air conditioning, heating, refrigerating, electronic monitoring, entertainment, recreational, maintenance, exclusion of vermin or insects, dust removal, and refuse or garbage equipment and all other equipment of every kind), lobby and all other indoor and outdoor furniture (including tables, chairs, planters, desks, sofas, shelves, lockers and cabinets), wall safes, furnishings, appliances (including ice boxes, refrigerators, fans, water heaters and incinerators), inventory, rugs, carpets, and other floor coverings, draperies and drapery rods and brackets, awnings, window shades, venetian blinds, curtains, lamps, chandeliers and other lighting fixtures and office maintenance and other supplies, and all attachments, additions and accessions thereto, together with all proceeds of the foregoing (including but not limited to insurance proceeds and awards or payments arising out of or related to condemnation proceedings).

The Bank's security interest in the Collateral shall be a continuing lien and shall include all proceeds and products of the Collateral including, but not limited to, the proceeds of any insurance thereon.

Debtor hereby consents to and instructs Bank to file financing statements in all locations deemed appropriate by the Bank from time to time.

The security interest granted to Bank in the Collateral shall not secure or be deemed to secure any indebtedness of the Borrower(s) to the Bank which is, at the time of its creation, subject to the provisions of any state or federal consumer credit or truth-in-lending disclosure statutes.

2. **The Indebtedness.** The Collateral secures payment of the indebtedness under that certain Credit Agreement dated as of May 15, 2008, executed by MID-VALLEY FOREST PRODUCTS LLC ("the Borrower(s)") and in the aggregate principal amount of \$13,209,050.00 owed to the Bank together with any and all modifications, extensions and renewals of such Indebtedness (hereinafter collectively referred to as the "Indebtedness") and performance of all the terms, covenants and agreements contained in this Security Agreement and in any other document, instrument or agreement evidencing or related to the Indebtedness or the Collateral.

The Indebtedness secured hereby shall not include any indebtedness of the Borrower(s) incurred for personal, family or household purposes except to the extent any disclosure required under any consumer protection law (including but not limited to the Truth in Lending Act) or any regulation thereto, as now existing or hereafter amended, is or has been given.

The Indebtedness is secured by a certain deed of trust dated of even date herewith, which deed encumbers certain real property described on the attached Exhibit "A" and incorporated herein by this reference (the "Real Property").

3. **Debtor's Representations and Warranties.** The Debtor hereby makes the following representations and warranties to the Bank, which representations and warranties are continuing:

(a) **Status:** The Debtor is an individual whose principal residence is in the state of Oregon, who is qualified to do business and in good standing in, and, where necessary to maintain

the Debtor's rights and privileges, has complied with the fictitious name statute of every jurisdiction in which the Debtor is doing business.

(b) **Authority:** The execution, delivery and performance by the Debtor of this Agreement and any instrument, document or agreement required hereunder have been duly authorized and do not and will not: (i) violate any provision of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having application to the Debtor; or (ii) result in a breach of or constitute a default under any material indenture or loan or credit agreement or other material agreement, lease or instrument to which the Debtor is a party or by which it or its properties may be bound or affected.

(c) **Legal Effect.** This Security Agreement constitutes, and any document, instrument or agreement required hereunder when delivered will constitute, legal, valid and binding obligations of the Debtor enforceable against the Debtor in accordance with their respective terms.

(d) **Fictitious Trade Styles:** There are no fictitious trade styles used by the Debtor in connection with its business operations. The Debtor shall notify the Bank not less than 30 days prior to effecting any change in the matters described herein or prior to using any other fictitious trade style at any future date, indicating the trade style and state(s) of its use.

(e) **Title to Collateral; Permitted Liens.** The Debtor has good and marketable title to the Collateral and the same is not now and shall not become subject to any security interest, encumbrance, lien or claim of any third person other than: (i) liens and security interests to secure the Indebtedness or other indebtedness owed to the Bank; (ii) liens for taxes, assessments or similar charges either not yet due or being duly contested in good faith; (iii) liens of mechanics, materialmen, warehousemen or other like liens arising in the ordinary course of business and securing obligations which are not yet delinquent; (iv) liens and security interests which, as of the date hereof, have been disclosed to and approved by the Bank in writing; (v) purchase money liens or purchase money security interests upon or in any property acquired or held by the Debtor in the ordinary course of business to secure indebtedness outstanding on the date hereof or permitted to be incurred hereunder; and (vi) those liens and security interests which in the aggregate constitute an immaterial and insignificant monetary amount with respect to the net value of the Debtor's assets (collectively "Permitted Liens").

(f) **Financial Statements.** All financial statements, information and other data now or hereafter submitted to the Bank in connection with the transaction with respect to which this Security Agreement is entered into are true, accurate and correct and have been or will be prepared in accordance with generally accepted accounting principles consistently applied. Since the most recent submission of any such financial statement, information or other data to the Bank, the Debtor represents and warrants that no material adverse change in the financial condition or operations as disclosed therein or thereby has occurred which has not been fully disclosed to the Bank in writing.

(g) **Litigation.** Except as have been disclosed to the Bank in writing, there are no actions, suits or proceedings pending or, to the knowledge of the Debtor, threatened against or affecting the Debtor or the Debtor's properties before any court or administrative agency which, if determined adversely to the Debtor, would have a material adverse effect on the Debtor's financial condition or operations or on the Collateral.

(h) **Taxes.** The Debtor has filed all tax returns required to be filed and paid all taxes shown thereon to be due, including interest and penalties, other than taxes which are currently payable without penalty or interest or those which are being duly contested in good faith.

IN WITNESS WHEREOF, the parties hereto have caused this Security Agreement to be executed as of the date first herein above written.

BANK:

BANK OF THE WEST

BY: 

NAME: Casey Garten, Vice President

DEBTOR:

MID-VALLEY FOREST PRODUCTS LLC

BY: 

NAME: Charles A. Sides, Member

ADDRESS:

245 13th Street NE
Salem, OR 97301

EXHIBIT "A"

DESCRIPTION OF REAL PROPERTY

Deed of Trust

All that real property located in the County Linn, State of Oregon, legally described as follows:

LEGAL DESCRIPTION

Parcel 1:

Beginning at an iron rod on the South line of State Highway No. 222, which iron rod is 10.02 feet North 86° 00' West from the intersection of the South line of said Highway with the West line of the East half of the southwest quarter of Section 20, Township 9 South, Range 2 East of the Willamette Meridian, Linn County, Oregon, said point of beginning being the Northeast corner of that certain tract of land conveyed to Gerald M. Wilson et, al by deed recorded in Vol. 251, Page 382, Linn County Deed Records; and running thence South 170.00 feet to an iron pipe; thence West 6.00 feet to an iron pipe; thence South 746.85 feet to an iron pipe in the Northerly right of way line of the Southern Pacific railroad; thence North 73° 44' West along said right of way line, 495.96 feet to an iron pipe; thence North 200.00 feet to an iron pipe; thence North 73° 44' west, parallel with the said railroad, 186.20 feet to an iron pipe in the east line of Wilson Acres Subdivision, if extended Southerly; thence North 00° 02' West, along the East line of said Wilson Acres Subdivision, and extended 530.46 feet to an iron pipe at the Northeast corner thereof; thence Northeasterly, along the South line of said state Highway No. 222, to an iron pipe which bears North 82° 52' East 151.00 feet from the Northeast corner of said Wilson Acres; thence South 00° 03' East 141.26 feet to an iron pipe; thence South 83° 48' East 252.35 feet to an iron pipe; thence South 04° 02' West 21.97 feet to an iron pipe; thence South 87° 02' East 239.24 feet to an iron pipe; thence North 181.02 feet to an iron pipe in the South line of said state Highway; thence South 86° 00' 23.05 feet to the point of beginning.

Parcel 2:

Beginning at a point where the North line of the Southern Pacific Railroad intersects the West line of the East half of the southwest quarter of Section 20 in Township 9 South, Range 2 East of the Willamette Meridian, Linn County, Oregon; thence North 5.00 chains; thence East 1.00 chains; thence South 5.00 chains, more or less to the said North line of the said Southern Pacific Railroad right of way; thence Westerly along said right of way to the point of beginning.

Together with a non exclusive easement for ingress and egress over and across the following described parcel to-wit: Beginning at a point on the West line of the East half of the Southwest quarter of section 20; Township 9 South, Range 2 East of the Willamette Meridian in Linn County, Oregon, where a such line intersections the South line of State Highway 222; thence Westerly along the South line of said highway 10 feet; thence South parallel with the West line of said Section a distance of 170 feet; thence West 6 feet; thence South, parallel with the West line of said section distance of 746 feet; more or less to the north line of the Southern Pacific railroad right of way; thence Easterly along said right of way to the West line of the East half of the Southwest quarter of said Section; thence North parallel with the West line of said section, a distance of 922 feet, more or less to the point of beginning

SECURITY AGREEMENT

This Security Agreement is made and entered into this August 28, 2009, by and between BANK OF THE WEST (the "Bank") and Mid Valley Forest Products, LLC (the "Debtor").

1. **Grant of Security Interest.** The Debtor hereby grants to the Bank a security interest in and to all of the following property (hereinafter collectively referred to as the "Collateral"):

Secured LLC info

(a) **Equipment.** All goods now owned or hereafter acquired by the Debtor or in which the Debtor now has or may hereafter acquire any interest, including, but not limited to, all machinery, equipment, furniture, furnishings, fixtures, tools, supplies and motor vehicles of every kind and description, and all additions, accessions, improvements, replacements and substitutions thereto and thereof.

(b) **Inventory.** All inventory now owned or hereafter acquired by the Debtor including, but not limited to, all raw materials, work in process, finished goods, inventory leased to others or held for lease, merchandise, parts and supplies of every kind and description, including inventory temporarily out of the Debtor's custody or possession, together with all returns on accounts (the "Inventory").

(c) **Accounts.** All accounts, letter of credit rights, commercial tort claims, contract rights and general intangibles, including software and payment intangibles, now owned or hereafter created or acquired by the Debtor including, but not limited to, all receivables, including as-extracted receivables, credit card receivables, health care receivables, insurance receivables, software receivables and license fees, goodwill, trademarks, trademark applications, trade styles, trade names, patents, patent applications, copyrights and copyright applications, customer lists, business records and computer programs, tapes, disks and related data processing software that at any time evidence or contain information relating to any of the Collateral.

(d) **Money Market.** Account No(s). 468-001201 maintained with Bank of the West and all substitutions thereof, together with all interest accruing thereunder and therefrom.

(e) **Documents.** All documents, instruments and chattel paper, whether electronic or tangible, now owned or hereafter acquired by the Debtor, including, but not limited to, warehouse and other receipts, bills of sale, promissory notes and bills of lading.

(f) **Monies.** All monies, deposit accounts, certificates of deposit, investment property and securities of the Debtor now or hereafter in the Bank's or its agents' possession.

The Bank's security interest in the Collateral shall be a continuing lien and shall include all proceeds and products of the Collateral including, but not limited to, the proceeds of any insurance thereon.

Debtor hereby consents to and instructs Bank to file financing statements in all locations deemed appropriate by the Bank from time to time.

The security interest granted to Bank in the Collateral shall not secure or be deemed to secure any indebtedness of the Debtor to the Bank which is, at the time of its creation, subject to the provisions of any state or federal consumer credit or truth-in-lending disclosure statutes.

2. **The Indebtedness.** The Collateral secures payment of the indebtedness owed to the Bank by the Debtor under that certain application and agreement for a standby letter of credit in the approximate amount of \$460,000.00 dated July 30, 2009 and the subsequent standby letter of credit in favor of Masonite Beams AB together with any and all modifications, extensions and renewals of such

SECURITY AGREEMENT

This Security Agreement is made and entered into this May 15, 2008, by and between BANK OF THE WEST (the "Bank") and the undersigned (the "Debtor").

1. **Grant of Security Interest.** The Debtor hereby grants to the Bank a security interest in and to all of the following property (hereinafter collectively referred to as the "Collateral"):

(a) **Equipment.** All goods now owned or hereafter acquired by the Debtor or in which the Debtor now has or may hereafter acquire any interest, including, but not limited to, all machinery, equipment, furniture, furnishings, fixtures, tools, supplies and motor vehicles of every kind and description, and all additions, accessions, improvements, replacements and substitutions thereto and thereof.

(b) **Inventory.** All inventory now owned or hereafter acquired by the Debtor including, but not limited to, all raw materials, work in process, finished goods, inventory leased to others or held for lease, merchandise, parts and supplies of every kind and description, including inventory temporarily out of the Debtor's custody or possession, together with all returns on accounts (the "Inventory").

(c) **Accounts.** All accounts, letter of credit rights, commercial tort claims, contract rights and general intangibles, including software and payment intangibles, now owned or hereafter created or acquired by the Debtor including, but not limited to, all receivables, including as-extracted receivables, credit card receivables, health care receivables, insurance receivables, software receivables and license fees, goodwill, trademarks, trademark applications, trade styles, trade names, patents, patent applications, copyrights and copyright applications, customer lists, business records and computer programs, tapes, disks and related data processing software that at any time evidence or contain information relating to any of the Collateral.

(d) **Documents.** All documents, instruments and chattel paper, whether electronic or tangible, now owned or hereafter acquired by the Debtor, including, but not limited to, warehouse and other receipts, bills of sale, promissory notes and bills of lading.

(e) **Monies.** All monies, deposit accounts, certificates of deposit, investment property and securities of the Debtor now or hereafter in the Bank's or its agents' possession.

(f) **Assets.** All assets of the Debtor, whether now existing or hereafter acquired, and the products and proceeds thereof.

The Bank's security interest in the Collateral shall be a continuing lien and shall include all proceeds and products of the Collateral including, but not limited to, the proceeds of any insurance thereon.

Debtor hereby consents to and instructs Bank to file financing statements in all locations deemed appropriate by the Bank from time to time.

Commercial/Agricultural Security Agreement 0000000092927



Guaranty & SecAgreement-Butte Development
F0010894

1050466982

18 MID-VALLEY FOREST PRODUCTS, LLC

2. **The Indebtedness.** The Collateral secures payment of the indebtedness of the Debtor under that certain Guaranty dated as of May 15, 2008, in the principal amount of \$13,209,050.00, given for the benefit of MID-VALLEY FOREST PRODUCTS LLC together with any and all modifications, extensions and renewals of such indebtedness (hereinafter collectively referred to as the "Indebtedness") and performance of all the terms, covenants and agreements contained in this Security Agreement and in any other document, instrument or agreement evidencing or related to the Indebtedness or the Collateral.

The Indebtedness secured hereby shall not include any indebtedness of the Debtor incurred for personal, family or household purposes except to the extent any disclosure required under any consumer protection law (including but not limited to the Truth in Lending Act) or any regulation thereto, as now existing or hereafter amended, is or has been given.

3. **Debtor's Representations and Warranties.** The Debtor hereby makes the following representations and warranties to the Bank, which representations and warranties are continuing:

(a) **Status:** The Debtor's correct legal name is as stated in this Agreement and the Debtor is a corporation duly organized and validly existing under the laws of the state of Oregon, and with its chief executive office in the state of Oregon, and is properly licensed and is qualified to do business and in good standing in, and, where necessary to maintain the Debtor's rights and privileges, has complied with the fictitious name statute of every jurisdiction in which the Debtor is doing business.

(b) **Authority:** The execution, delivery and performance by the Debtor of this Agreement and any instrument, document or agreement required hereunder have been duly authorized and do not and will not: (i) violate any provision of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having application to the Debtor; (ii) result in a breach of or constitute a default under any material indenture or loan or credit agreement or other material agreement, lease or instrument to which the Debtor is a party or by which it or its properties may be bound or affected; or (iii) require any consent or approval of its stockholders or violate any provision of its articles of incorporation or by-laws; or (iv) violate any provision of its partnership agreement; or (v) require any consent or approval of its members or violate any provision of its articles of organization or operating agreement.

(c) **Legal Effect.** This Security Agreement constitutes, and any document, instrument or agreement required hereunder when delivered will constitute, legal, valid and binding obligations of the Debtor enforceable against the Debtor in accordance with their respective terms.

(d) **Fictitious Trade Names:** There are no fictitious trade names, fictitious trade styles, assumed business names or trade names (defined herein as "Trade Name") used by the Debtor in connection with its business operations. The Debtor shall notify the Bank not less than 30 days prior to effecting any change in the matters described herein or prior to using any other fictitious Trade Name at any future date, indicating the Trade Name and state(s) of its use.

(e) **Title to Collateral; Permitted Liens.** The Debtor has good and marketable title to the Collateral and the same is not now and shall not become subject to any security interest, encumbrance, lien or claim of any third person other than: (i) liens and security interests to secure the Indebtedness or other indebtedness owed to the Bank; (ii) liens for taxes, assessments or similar charges either not yet due or being duly contested in good faith; (iii) liens of mechanics, materialmen, warehousemen or other like liens arising in the ordinary course of business and securing obligations which are not yet delinquent; (iv) liens and security interests which, as of the date hereof, have been disclosed to and approved by the Bank in writing; (v) purchase money liens or purchase money security

IN WITNESS WHEREOF, the parties hereto have caused this Security Agreement to be executed as of the date first herein above written.

DEBTOR(S):

BUTTE DEVELOPMENT COMPANY

By: 

NAME: Charles A. Sides, President

ADDRESS:

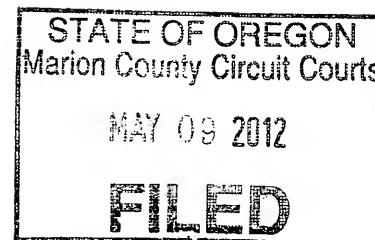
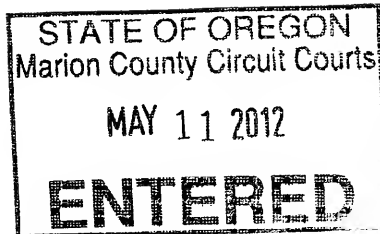
245 13th Street NE
Salem, OR 97308

BANK:

BANK OF THE WEST

BY: 

NAME: Casey Garten, Vice President



IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JACK R. YARBROUGH,

Plaintiff,

v.

ASPEN PACIFIC CITY, LLC, an Oregon
limited liability company; MANAGEMENT
GROUP OF OREGON, an Oregon
corporation; CHARLES SIDES, an individual;
and BANK OF THE WEST, a California
chartered commercial bank;

Defendants.

) Case No. 11C19158

) Judge Day

) **DEFENDANT BANK OF THE WEST'S**
) **RESPONSE TO PLAINTIFF'S MOTION**
) **TO EXPAND TIME PURSUANT TO**
) **ORCP 47F**

) Filing Fee: \$100.00

) Statutory Requirement: ORS 21.200(1)(a)

INTRODUCTION

Defendant Bank of the West ("**BOTW**") hereby responds to Plaintiff's Motion to Expand Time for Discovery and Depositions Pursuant to ORCP 47F C ("**Plaintiff's Motion**"). This Court should deny Plaintiff's Motion on the grounds and for the reasons that the Affidavit of John E. Storkel in Support of ORCP 47 Motion does not state any reasons why Plaintiff cannot present by affidavit or declaration facts essential to justify the opposition of Plaintiff to BOTW's Motion for Summary Judgment. Plaintiff's desire to fish for something he can use to oppose BOTW's Motion for Summary Judgment is not a basis for relief under ORCP 47F.

BOTW relies on ORCP 47F, the Affidavit of Aaron J. Bell in support of this Response, the pleadings and records in this case, and the Points and Authorities in this Response.

////

1 POINTS AND AUTHORITIES

2 It is essential to a motion under ORCP 47F that the party opposing the motion for summary
3 judgment state reasons why it “cannot” “present by affidavit or declaration facts essential to
4 justify the opposition of that party”.¹

5 “[T]he burden is on the nonmoving party... to show what material
6 facts would be discovered which would preclude summary
7 judgment. If further discovery could not elicit evidence that would
raise genuine issues of material fact, summary judgment would be
appropriate.”

8 Klinge v. Eikenberry, 849 F2d 409, 412 (9th Cir. 1988) (citations omitted). Although
9 Klinge involved the interpretation of FRCP 56(d) as opposed to ORCP 47F, the rules are
10 substantially the same.

11 Contrary to ORCP 47F, Mr. Storkel’s Affidavit merely contains Mr. Storkel’s expression of
12 interest in further discovery. He expresses his interest in obtaining a document that supports
13 BOTW’s Motion for Summary Judgment but that was not offered by BOTW. He wishes to
14 examine and review BOTW’s files related to its loans to Mid-Valley Forest Products LLC, and
15 he anticipates the need to depose Ms. Creekpaum of Bank of the West but he does not state any
16 specific reason. Similarly, Mr. Storkel does not give any reason why the excerpt of the
17 Foreclosure Guarantee attached to Ms. Meisenburg’s Affidavit is insufficient or what particular
18 facts he expects to elicit from the deposition of Ms. Meisenburg, whose Affidavit merely
19 substantiates, and creates the foundation for, the documents attached to it.

20 ORCP 47F does not sanction a fishing expedition; Plaintiff must establish by affidavit or
21 declaration that he cannot present facts essential to his opposition without a continuance. The
22 dispute between Plaintiff and BOTW concerns the parties’ respective interest(s) in a steel

23 _____
24 ¹ **When affidavits or declarations are unavailable.** Should it appear from the affidavits or declarations of a party
25 opposing the motion that such party cannot, for reasons stated, present by affidavit or declaration facts essential to
justify the opposition of that party, the court may deny the motion or may order a continuance to permit affidavits or
declarations to be obtained or depositions to be taken or discovery to be had, or may make such other order as is
just.

1 building lying on a parcel of real property that is not owned by Plaintiff or BOTW. Logic
2 would seem to dictate that Plaintiff's opposition to BOTW's Motion for Summary Judgment
3 would involve facts supporting the existence of Plaintiff's interest in the steel building (if any),
4 and the priority or exclusivity of his interest over the interest of BOTW. BOTW has
5 established in its Motion for Summary Judgment that those facts do not exist at all, but there is
6 absolutely no basis for an argument by Plaintiff that those facts will be found in BOTW's loan
7 files or in the depositions of Ms. Creekpaum and Ms. Meisenburg.

8 Plaintiff is searching for facts relating to the interest of someone other than Plaintiff in the
9 steel building and those facts are irrelevant to BOTW's Motion for Summary Judgment.
10 Plaintiff does not have possession of the steel building and it does not have standing to argue
11 that someone other than the owner of the real property where the steel building is lying is the
12 true owner. See Gissel v. State, 111 Idaho 725, 728, 1156, 727 P.2d 1153, 1156 (1986). In
13 Gissel the Supreme Court of Idaho considered the respective rights of the State of Idaho and
14 Gissel to wild rice Gissel had grown on land owned jointly by the State of Idaho and the
15 National Forest Service. The Court held that Gissel had a right to the rice grown on the
16 National Forest Service land because the State of Idaho only had standing to assert its own
17 interest in the rice. Under the principle of *jus tertii*, the State of Idaho could not present
18 evidence that the National Forest Service was the true owner of the other half of the land
19 because that evidence was not relevant to the State of Idaho's burden of establishing that it had
20 a more legitimate interest in the rice than Gissel.

21 The Affidavit of Mr. Storkel does not give any reason why his client cannot present facts
22 essential to justify an opposition to BOTW's motion for summary judgment. He did not
23 explain how additional discovery would assist him in overcoming BOTW's Motion for
24 Summary Judgment, what specific information he seeks, and how that information would
25 preclude summary judgment in favor of BOTW. The discovery Mr. Storkel did describe would

1 only be directed at facts regarding the interests of persons other than Plaintiff, and under the
2 principle of *jus tertii*, those facts (that evidence) is irrelevant. Therefore, the discovery
3 identified by Mr. Storkel would be fruitless to Plaintiff's opposition to BOTW's Motion for
4 Summary Judgment so there is no justification for a continuance.

5 **CONCLUSION**

6 It does not appear from the Affidavit of John Storkel filed in support of Plaintiff's Motion,
7 that Plaintiff cannot present facts essential to Plaintiff's opposition to BOTW's Motion for
8 Summary Judgment. Plaintiff's justification for a continuance is his need for further discovery,
9 but Plaintiff has failed to satisfy his burden of establishing the specific facts that will elicited
10 from that discovery and that those facts will be admissible. In fact, the discovery alluded to in
11 Mr. Storkel's Affidavit is completely irrelevant to Plaintiff's legal claims in this case.
12 Therefore, Plaintiff's Motion should be denied and BOTW's Motion for Summary Judgment
13 should be granted.

14 **DATED** this 8th day of May, 2012.

15 **BELL LAW FIRM, P.C.**

16 

17 BY: Aaron J. Bell, OSB #871649
18 Attorneys for Bank of the West